Supreme Court, U. S.
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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1978

No. 78-630

STATE OF WASHINGTON; CHARLES HODDE, Individually and as Director of the State of Washington Department of Revenue; JACK G. NELSON, Individually and as Director of the State of Washington Department of Motor Vehicles; ROBERT S. O'BRIEN, Individually and as Washington State Treasurer,

Appellants,

v.

CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION; LUMMI INDIAN TRIBE; and MAKAH INDIAN TRIBE,

Appellees.

(continued on inside front cover)

ON APPEAL FROM THE DISTRICT COURT OF THE EASTERN DISTRICT OF WASHINGTON

APPELLANTS' OPENING BRIEF

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STATE PRINTING PLANT OLYMPIA, WASHINGTON

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CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION; LUMMI INDIAN TRIBE; and MAKAH INDIAN TRIBE,

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STATE OF WASHINGTON,

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UNITED STATES OF AMERICA,
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CONFEDERATED BANDS & TRIBES OF THE YAKIMA INDIAN NATION,

Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE EASTERN DISTRICT OF WASHINGTON

APPELLANTS' OPENING BRIEF

OPINION BELOW

The opinion of the three-judge district court (J.S. App. 1-65) is reported at 446 F.Supp. 1339.

JURISDICTION

This appeal involves two separate cases from the same court involving identical or closely-related questions.[1] The declaratory judgments and decrees of permanent restraint were filed on May 10, 1978. The State's motions for partial new trials were denied on July 17, 1978 (J.S. App. 77, 79).

In the *Colville* case, on July 12, 1978, the State filed a notice of appeal to the Supreme Court, appealing those portions of the judgment prohibiting (a) application of motor vehicle excise taxes to motor vehicles owned by the Tribes or their reservation resident members and (b) the exercise of civil and criminal jurisdiction under Revised Code of Washington chapter 37.12 against the Lummi and Makah Indian Tribes or their members (A.131). On August 14, 1978, appellants filed a notice of appeal dealing with all the cigarette and sales tax issues decided adversely to the State (A.133). On September 8, 1978, appellants filed an amended notice of appeal adding the motor vehicle excise tax and Public Law 83-280 issues to the other issues raised in the August 14, 1978 notice of appeal (A.135).

In the *Yakima* case, on August 14, 1978, the State

[1]The cases are *Confederated Bands of the Colville Indian Reservation v. State of Washington*, Civ. No. 3868 (E.D. Wash. May 10, 1978) [hereinafter the *Colville* case] and *United States of America and Confederated Bands and Tribes of the Yakima Indian Reservation v. State of Washington*, Civ. No. 3909 (E.D. Wash. May 10, 1978) [hereinafter the *Yakima* case]. The district court consolidated these cases only for purposes of hearing and decision. (Stipulation for Place and Order of Trial). Separate judgments and decrees of permanent restraint were entered by the district court (J.S. App. 66 and 71), and the cases were otherwise treated separately.

filed a notice of appeal dealing with all the cigarette and sales tax issues decided adversely to the State (A.253).

Since these two separate cases from the same district court involve identical or closely related questions, pursuant to Sup. Ct. R. 15(3), a single Jurisdictional Statement covering both cases was filed on October 13, 1978. On February 21, 1979, this Court entered an Order postponing further consideration of the question of jurisdiction to the hearing of the case on the merits (A.137, 255).

This being a direct appeal from a three-judge federal district court, jurisdiction of the Supreme Court to review the judgments below is confirmed by 28 U.S.C. §1253. However, this Court having postponed consideration of jurisdiction, the State is conscious of Sup. Ct. R. 16(6) which directs counsel in cases such as this to address themselves to the question of jurisdiction.

Because of the nature of the jurisdictional issues raised in the *Colville* case about the timeliness of the motor vehicle excise tax portion of the appeal (Mot. of Appellee Colville Conf. Tribes * * * to Dismiss or Affirm, pp. 8-9) and in the *Yakima* case about whether a three-judge court should have been convened (U.S. Mot. to Dismiss), the State will address the jurisdiction question at the outset of the Argument portion of this brief (Argument, Parts I & II, *infra*), after having reviewed the facts necessary to resolution of these questions in the Statement of the Case portion of the brief (*infra*, pp. 7-26).

QUESTIONS PRESENTED

1. Whether a three-judge district court was lawfully convened under 28 U.S.C. §2281 such that this Court has jurisdiction over this appeal pursuant to 28 U.S.C. §1253.

2. Whether the State timely appealed the motor vehicle excise tax issues in the *Colville* case such that this Court has jurisdiction over this portion of the *Colville* appeal.

3. Whether a state may impose upon an Indian Tribe and/or its licensed Indian retailers the obligation to collect state excise taxes on sales of personal property on the reservation to non-Indian purchasers where the legal incidence of the tax falls upon the non-Indian, despite the fact that the Tribe has adopted ordinances taxing these same transactions. This question includes the subordinate questions of whether the state may tax such non-Indian purchasers at all and, if so, whether the state may further require the Indian sellers to collect the tax from their non-Indian purchasers and remit it to the state.

4. Whether a state may impose upon an Indian Tribe and/or its licensed Indian retailers the obligation to collect state excise taxes imposed on their sales of personal property to Indian purchasers other than members of the Tribe occupying the reservation, where the legal incidence of the tax falls upon the Indian purchaser, despite the fact that the Tribe has adopted ordinances taxing these same transactions.

5. Whether a state may impose upon an Indian Tribe and/or its licensed Indian retailers making sales on the reservation to non-Indian purchasers, nondiscriminatory reporting and auditing requirements designed to ensure that taxes collected on sales to non-Indians are properly accounted for.

6. Whether, assuming the state has the authority to require Indian Tribes and/or their licensed retailers to collect and remit taxes on their sales of cigarettes to non-Indians, the state may enforce collection of such taxes by confiscating as contraband those cigarettes within the state which are being shipped in interstate commerce to the Indian Tribe for ultimate resale to non-members of the Tribe.

7. Whether a state may lawfully seize and levy upon property of Indian Tribes to enforce collection responsibility for state taxes imposed against non-Indian purchasers.

8. Whether a state may impose an excise tax on the privilege of using a motor vehicle with respect to motor

vehicles, travel trailers and campers owned by an Indian Tribe or its enrolled members residing upon the reservation, where the motor vehicles are used partly on and partly off the reservation.

9. Whether the State of Washington's assumption of partial territorial jurisdiction over Indian reservations pursuant to RCW chapter 37.12 violates the Equal Protection Clause of the United States Constitution.[2]

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES AND REGULATIONS INVOLVED

Federal Constitution.

U.S. CONST., Art. I, §8, cl. 3 (Commerce Clause) (Br. App. 1a)

U.S. CONST., Art. VI, cl. 2 (Supremacy Clause) (Br. App. 1a)

U.S. CONST., Amendment XIV, §1 (Equal Protection Clause) (Br. App. 1a)

Treaties

Treaty with the Dwamish Etc. Indians (Lummi), Jan. 22, 1855, 12 Stat. 927, Art. II (Br. App. 1a)

Treaty with the Makah Tribe, Jan. 31, 1855, 12 Stat. 939, Art. II (Br. App. 2a)

Treaty with the Yakamas, June 9, 1855, 12 Stat. 951, Art. II (Br. App. 3a)

Executive Orders

Executive Order of July 2, 1872 (Colville Reservation) (Br. App. 4a)

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[2]This is exactly the same question resolved in favor of the State by this Court in the recent case of *State of Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 99 S. Ct. 740 (No. 77-388, Jan. 16, 1979). As noted in the Jurisdictional Statement at p. 9, the issue is controlled by the Court's decision in *Washington v. Yakima, supra*. Accordingly, no further mention of this issue will be made in this case.

Federal Statutes and Rules of Court

Washington Enabling Act, 25 Stat. 676, ch. 180, §4 (1889) (Br. App. 5a)

Public Law 83-280, 67 Stat. 588, ch. 505 (1953) (Br. App. 6a)

Public Law 83-280, 67 Stat. 588, ch. 505, §2 (1953), *as amended*, codified at 18 U.S.C. §1162 (1976) (Br. App. 10a)

Public Law 83-280, 67 Stat. 588, ch. 505, §4 (1953), *as amended*, codified at 28 U.S.C. §1360 (1976) (Br. App. 11a)

Public Law 90-284, Title IV, 82 Stat. 78, codified at 25 U.S.C. §§1321-1326 (1976) (Br. App. 13a)

28 U.S.C. §1253 (1976) (Br. App. 16a)

28 U.S.C. §2101(b) (1976) (Br. App. 17a)

FED. R. CIV. P. 59(a) and (b) (Br. App. 17a)

State Constitution

WASH. CONST., Art. XXVI, §2 (Br. App. 18a)

State Statutes

RCW 82.08.020, -.030(4), -.050 (retail sales tax) (Br. App. 19a)

RCW 82.12.020 (use tax) (Br. App. 21a)

RCW 82.24.020, -.030, -.040, -.050, -.080, -.130, -.250, -.260 (cigarette tax) (Br. App. 22a)

RCW 82.44.020, -.060, -.110 (motor vehicle excise tax) (Br. App. 27a)

RCW 82.50.400, -.410, -.510, -.540 (taxation of travel trailers and campers) (Br. App. 30a)

RCW 46.16.010 (vehicle licensing) (Br. App. 32a)

State Administrative Regulations

WAC 458-20-186 (Rule 186) (Br. App. 34a)

WAC 458-20-192 (Rule 192) (Br. App. 38a)

ETB 504.08.192 (excise tax bulletin) (Br. App. 42a)

STATEMENT OF THE CASE

The facts essential to a resolution of this appeal are not in serious dispute, and are fairly stated in the district court's opinion (J.S. App. 1-65).[3]

The format of this Statement of the Case will be to review the nature of the proceedings below, set forth the relevant facts, and then describe the action of the district court.

I. NATURE OF PROCEEDINGS.

In reviewing the proceedings below, the State will include those procedural matters germane to resolution of the jurisdictional questions (Argument, Parts I and II, *infra*, pp. 32-53).

A. The Colville Case

The action in the *Colville* case, No. 3868, was commenced on May 17, 1973. The Tribe's complaint sought declaratory and injunctive relief against the application and enforcement of Washington's cigarette excise taxes as applied to sales of cigarettes on the Tribes' reservations, and the seizure as contraband of cigarettes being delivered to the Tribes' reservations (Complaint, ¶6.4, A.11). The Tribes alleged that the application and enforcement of the state's cigarette tax on reservation cigarette sales was prohibited by U.S. Const., Art. I, Sec. 8, cl. 3 (the "Indian Commerce Clause"), the Washington Enabling Act, 25 Stat. 676, ch. 180, §4, and the Indian Trader's Act, 25 U.S.C. §261 (1976), *et seq.* (Complaint, ¶1.7, A.4-7). The Tribes also alleged that seizure as contraband of cigarettes moving in interstate commerce to the Tribes' reservations violated U.S. Const., Art. I, Sec. 8, cl. 3 (the Interstate Commerce Clause) (Complaint, ¶2.3, A.7).

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[3]The facts were established by the stipulation of the parties contained in the pre-trial orders, as supplemented by deposition testimony and uncontroverted affidavits; see, A.28, 125, 168, 219.

The complaint also sought declaratory and injunctive relief against the application of general state civil and criminal jurisdiction over the Colville Tribe and partial state assumption of civil and criminal jurisdiction over the Makah and Lummi Tribes, all of which were assumed pursuant to RCW chapter 37.12.

Because the complaint sought injunctive relief against the enforcement of state statutes, a three-judge district court was convened pursuant to former 28 U.S.C. §§2281 and 2284 (1970) (Certificate Requesting Three-Judge Court; Rec.). However, prior to the actual convening of the three-judge court, the Honorable Charles L. Powell, United States District Judge for the Eastern District of Washington, issued a temporary restraining order on November 5, 1973, restraining the State from enforcing its cigarette and tobacco products taxes against the Tribes (A.13-14). On September 6, 1974, the full three-judge court issued a preliminary injunction enjoining the State from engaging in any action or acting in any manner to enforce its cigarette and tobacco products taxes against the Tribes or their licensed retailers (A.15-16).

Thereafter, the Tribes filed several amended and supplemental complaints, repeating in substance the claims of the original complaint and adding issues pertaining to the imposition of the State's vehicle excise taxes on vehicles owned by members of the Tribes. (*See, e.g.*, Motion for Leave to File Second Amended Complaint, dated February 26, 1976; Rec.)

Subsequent to extensive discovery proceedings and briefing, the parties reached agreement upon a pretrial order (A.28), setting forth the agreed facts and issues to be tried to the court. The trial was held before the three-judge court in Seattle, Washington, on March 28, 1977.

On February 22, 1978, the three-judge district court entered its consolidated decision (J.S. App. 1-65). On May 10, 1978, the court entered a declaratory judgment and decree of permanent restraint (J.S. App. 66). That decree

prohibits the State from, *inter alia*, "Imposing the State of Washington cigarette tax upon non-Indians purchasing cigarettes from any of the Tribes or their licensed dealers on their reservations;" (J.S. App. 69).

On May 19, 1978, the State served a motion for a partial new trial pursuant to FED.R.CIV.P. 59(a) (A.130). This motion was addressed to the issue of the State's power to require non-Indians to pay the cigarette and sales taxes on their purchases from reservation Indians and to require the Indian sellers, in turn, to collect those taxes for the State.

On July 12, 1978, the State filed a notice of appeal to the Supreme Court of the United States, appealing from that portion of the judgment prohibiting the application of motor vehicle excise taxes on motor vehicles owned by the Tribes or their reservation resident members and prohibiting the exercise of civil and criminal jurisdiction under RCW chapter 37.12 against the Lummi and Makah Indian Tribes or their members (A.131).

On July 17, 1978, the three-judge district court entered an order denying the State's motion for partial new trial (J.S. App. 77).

On August 14, 1978, the State filed a notice of appeal dealing with all the cigarette and sales tax issues decided adversely to the State by the three-judge court (A.133).

On September 8, 1978, the State filed an amended notice of appeal adding the motor vehicle excise tax and Public Law 83-280 issues decided adversely to the State to the cigarette and sales tax issues contained in the notice of appeal filed on August 14, 1978 (A.135).

The Jurisdictional Statement was filed on October 13, 1978. On February 21, 1979, this Court entered an order postponing further consideration of the question of jurisdiction to the hearing on the merits (A.137).

B. The Yakima Case.

The action in the *Yakima* case, No. 3909, was commenced on July 18, 1973, by the United States on behalf of the Yakima Indian Nation (A.138). The

complaint sought declaratory and injunctive relief against the enforcement of state cigarette taxes on cigarette sales by the Yakima Indian Nation, including the seizure of cigarettes from interstate common carriers bound for the Yakima Indian Reservation (Complaint, Prayer, ¶d, A.143). The United States alleged that such actions: (1) were an unconstitutional interference with Indian commerce and the internal affairs of the Tribe, (2) violated the terms of the Yakima Treaty, 12 Stat. 951, and the Washington Enabling Act, 25 Stat. 676, and (3) deprived the Tribe of property without due process of law (Complaint, ¶11, A.141-142).

On July 19, 1973, the United States requested the convening of a three-judge court because the complaint sought injunctive relief against the enforcement of state statutes on the grounds of unconstitutionality of such statutes (A.145). On July 20, 1973, District Judge Powell certified the necessity for a three-judge court because the complaint sought injunctive relief against enforcement of state statutes on the grounds of unconstitutional interference with interstate commerce and deprivation of property without due process of law (A.146).

Prior to the convening of the three-judge court, Judge Powell, on November 5, 1973, issued a temporary restraining order restraining the State from enforcing its cigarette and tobacco products taxes against the Tribe and its licensed retailers (A.147).

On April 24, 1974, the Yakima Indian Nation intervened as a plaintiff, making in substance the same allegations as made by the United States and seeking, in addition to injunctive relief, damages for interference with the Tribe's cigarette business (A.149-155).

Thereafter, the history of the *Yakima* case largely paralleled the history of the *Colville* case. On September 6, 1974, the full three-judge court issued a preliminary injunction enjoining the State from enforcing its cigarette and tobacco products taxes against the Tribe and its licensed retailers with respect to cigarettes or tobacco

products being shipped to the Tribe in interstate commerce (A.156). On October 4, 1974, the United States filed an amended complaint, expanding the scope of the complaint to include licensed retailers of the Tribe (Amended Complaint, ¶13, A.158, 161-162).

Subsequent to extensive discovery proceedings and briefing, the parties reached agreement upon a pretrial order (A.168-218), setting forth the agreed facts and issues to be tried to the court. The trial was held before the three-judge court in Seattle, Washington, on March 28, 1977.

On February 22, 1978, the court entered its consolidated decision (J.S. App. 1-65). On May 10, 1978, the court entered its declaratory judgment and decree of permanent restraint (J.S. App. 71). The decree parallels that in *Colville*. Thus, it prohibits the State from, *inter alia*, "Imposing the State of Washington cigarette and sales taxes upon non-Indians purchasing cigarettes from the Yakima Nation and its licensed dealers on the Yakima Indian reservation;" (J.S. App. 73).

On May 19, 1978, the State served a motion for a partial new trial pursuant to FED.R.CIV.P. 59(a) (A.252); see, note 37, *infra*. As in *Colville*, this motion was addressed to the issue of the State's power to require non-Indians to pay the cigarette and sales taxes on their purchases from reservation Indians and to require the Indian sellers, in turn, to collect those taxes for the State.

On July 17, 1978, the court entered an order denying the State's motion (J.S. App. 79).

On August 14, 1978, the State filed a notice of appeal dealing with all the cigarette and sales tax issues decided adversely to the State by the three-judge court (A.253). On October 13, 1978, the State filed its Jurisdictional Statement.

On February 21, 1979, this Court entered an order postponing further consideration of the question of jurisdiction to the hearing on the merits (A.255).

II. THE RELEVANT FACTS.

A. THE TRIBES AND RESERVATIONS.

1. **Colville, Lummi and Makah.** The Colville Tribe is an Indian tribe with a governing body, recognized by the United States (A.31). The Tribe has approximately 5,837 members (A.31), of which approximately 3,200 reside on the reservation (A.43). The total population of the Colville Indian Reservation is 7,027 (A.43). The Colville Indian Reservation encompasses 1.3 million acres (A.31) and is located entirely within the State of Washington (A.32). The reservation has in excess of 5,000 miles of roads of all types, including state public highways (A.42-43). The reservation was created by executive order in 1872. *See* Executive Order of July 2, 1872, 1 C. Kappler, INDIAN AFFAIRS, LAWS AND TREATIES 916 (1903) (Br. App. 4a).

The Lummi Indian Tribe is an Indian tribe with a governing body, recognized by the United States (A.32). The Tribe has approximately 2,000 enrolled members, of which approximately 1,250 reside on the Lummi Indian Reservation (A.32, 43). The Lummi Indian Reservation is located in northwestern Washington, and encompasses 7,319 acres (A.32). The reservation was created pursuant to the Treaty with the Dwamish Etc. Indians (Treaty of Point Elliott), 12 Stat. 927 (1855) (Br. App. 1a).

The Makah Indian Tribe is an Indian tribe with a governing body, recognized by the United States (A.32). The Tribe has approximately 1,000 members (A.32) of which approximately 900 reside on the reservation (A.44). The Makah Indian Reservation is located in Washington, and encompasses approximately 28,000 acres (A.32). The Makah Reservation was established pursuant to the Treaty With the Makah Tribe, 12 Stat. 939 (1855) (Br. App. 2a).

2. **Yakima.** The Confederated Bands and Tribes of the Yakima Indian Nation is an Indian tribe with a governing body, recognized by the United States (A.171).

The Tribe has a membership of over 6,000, of which approximately 5,000 live on the Yakima Indian Reservation (A.172). Approximately 1,500 Indians of other tribes and bands also reside on the reservation (A.172). Indians comprise approximately 25 percent of the population residing on the reservation (A.172). The Yakima Indian Reservation was reserved for the Tribe pursuant to the Treaty with the Yakamas, 12 Stat. 951 (Br. App. 3a). The reservation, located in eastern Washington, has approximately 1,387,505 acres within its exterior boundaries, of which all but approximately 270,895 acres are held in trust or restricted status by the United States as trustee for the Tribe, its members or other Indians. These 270,895 acres are owned in fee simple primarily by non-Indians (A.172).

B. TRIBAL TAXING SCHEMES.

1. **Colville, Lummi and Makah Tribes.** The tribal taxing schemes of the Colville, Lummi and Makah Tribes are virtually identical. Each tribe has enacted a tobacco ordinance regulating the sale, distribution and taxation of cigarettes on its reservation.[4] Pursuant to its ordinance, each Tribe has established one or more tribal tobacco outlets on "trust land" on its reservation under the control and jurisdiction of both tribal and federal regulations (A.32-34). All cigarettes purchased by the Tribes are paid for with federally-restricted tribal funds from an individual Indian money account in the Bureau of Indian Affairs agency serving the reservation pursuant to 25 C.F.R. Part 104 (1978), entitled "Individual Indian Money Accounts" (A.32-34).

All cigarettes are purchased from authorized wholesalers outside the State of Washington, and are shipped in sealed and licensed trucks of interstate commerce carriers directly to the respective reservations. There, distribution is made to the tribal tobacco outlets and tribal cigarette taxes fixed by the tribal or business council are collected.

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[4] *See* Colville Ordinance, A.104; Lummi Ordinance, A.118; and Makah Ordinance, A.111.

The tribal cigarette tax amounts are as follows:

Indian Tribe	Cigarette Tax
Colville Indian	$.04 per package
Lummi Indian	$.05 per package
Makah Indian	$.05 per package

The tribal tobacco ordinances provide that the cigarette tax imposed by the tribes is a tax upon distribution of cigarettes on the reservation by the respective tribes through tribal tobacco outlets (A.32-34). The ordinances also provide that the tax shall be "added to the retail price" and accordingly be paid by the retail purchaser.[5] The district court thus correctly viewed the incidence of the tax as being on the non-Indian purchaser.

The entire stock of cigarettes distributed by the plaintiff Tribes pursuant to their tobacco ordinances remain tribal property, owned and possessed by the respective Tribes until sale to the ultimate consumer. Payment to the respective Tribes of the wholesale distribution price provided in the ordinances by the operators of tribal tobacco outlets entitle the operators to custody of distributed cigarettes until sale to the ultimate consumer (A.32-34).

The operator of each tribal tobacco outlet is licensed by the respective Tribe and manages the tribally-owned tobacco business in the outlet as a tribal employee. Simultaneously, the operator of each tribal tobacco outlet except the Makah Resort manages his own business, selling a variety of merchandise at retail, including Indian jewelry, baskets, other Indian art, soft drinks and sundries. Business enterprises of the operators of tribal tobacco outlets other than the tobacco business are owned by the operators themselves (A.32-34).

The Colville and Lummi Tribes furnish the operators of their tribal tobacco outlets only with cigarettes and tobacco products pursuant to their tribal ordinances. The

[5]*See* Colville Ord., §8, A.107; Lummi Ord., §8, A.121; Makah Ord., §8, A.114.

operators themselves are required to furnish working capital and pay all business expenses. As remuneration for managing a tribal tobacco outlet, each operator is entitled to retain the gross revenue derived from sale of cigarettes and tobacco products in excess of the wholesale distribution price and excise tax levied by the respective Tribes (A.32-34).

The operator of each tribal outlet is a federally-licensed Indian trader.[6] In addition, the wholesaler of cigarettes purchased by the three Tribes, located in Portland, Oregon, is also a federally-licensed Indian trader (Pre-trial ¶2.6, A.34).

2. **Yakima Tribe.** The Yakima Tribe's business and cigarette taxing scheme is significantly different from the Colville, Lummi and Makah scheme. Instead of acting as a "retailer", the Yakima Tribe occupies the position of a wholesaler, wholesaling cigarettes to licensed retailers of the Tribe for resale at retail to members and non-members of the Tribe at locations on the reservation (A.172).

The Tribe imposes a tax of 22.5 cents per carton on each carton sold by its licensed retailers (A.177). This tax is designated in the Tribal Ordinance as a "permit fee", is to be paid by the retailer, and is not required to be added to the retail price (A.204-207). Thus, in contrast with the tribal taxes in *Colville*, the incidence of the tax in *Yakima* is clearly upon the licensed Indian retailer.

In addition, the Tribe obtains revenue by a "mark up" of one cent per carton sold to licensed Indian retailers. During 1975, the total revenue to the Tribe from its tax and wholesaling enterprise was $278,408.24. The retailer realizes a gross profit of 65¢ per carton (A.177).

The Tribal enterprise, licensing, and taxation scheme with respect to cigarettes is conducted as follows:

[6]This does not apply, however, to "full-blood" members of the respective Tribes. Apparently, the Secretary of the Interior is of the view that the Indian Traders Act, 25 U.S.C. §261, *et seq.*, does not require the licensing of "full-blood" tribal members. *See* Exhibit D to Affidavit of Barry D. Ernstoff in Support of Motion for a Preliminary Injunction, filed September 18, 1973 in Cause No. 3868.

cigarettes and tobacco products are purchased by the Tribe from out-of-state wholesalers and shipped directly to the Tribe by licensed, bonded interstate common carriers. Physical possession of these products is taken at the tobacco warehouse of the Tribe at Wapato, Washington, on the reservation. These products are in turn resold and delivered to the individually-owned smoke shop by tribally-owned vehicles. These products are then resold at retail to members and non-members of the Tribe (A.172-175).

All persons licensed by the Tribe to sell cigarettes and tobacco products at retail within the exterior boundaries of the Yakima Indian Reservation are enrolled members of the Tribe. The land upon which these licensed Indian retailers conduct their retail business is allotted land held in trust by the United States for individual Indians or by restricted deed to individual Indians (A.172-175).

The Tribal cigarette business is financed entirely by the Tribe and the retail cigarette businesses are financed entirely by the licensed Indian retailers. Some of the retailers obtain their financing from the tribal loan program. The retailers' places of business are accessible by public roads and highways and are located in areas of the reservation open to the general public (A.176).

A majority of the cigarettes and tobacco products sold by the licensed Indian retailers are purchased by persons who are not members of the Tribe. No precise figures are available to measure the exact percentage of cigarettes purchased by members of the Tribe (A.176-177).

The funds received by the Tribe from its cigarette tax, plus profits from its cigarette wholesaling enterprise are available for expenditure by the Tribe in support of its governmental functions (A.177).

C. THE STATE'S CIGARETTE AND SALES TAXING SCHEME.

1. **State Cigarette Excise Tax.** The State of Washington imposes a cigarette excise tax in the amount

of $1.60 per carton.[7] The tax is imposed pursuant to RCW 82.24.020 (Br. App. 22a) upon the sale, use, consumption, handling, possession or distribution of cigarettes. The tax is collected by means of tax stamps affixed to individual packages of cigarettes. Retailers are required to either purchase pre-stamped cigarettes from wholesalers or purchase a supply of stamps from the State which are to be affixed to the cigarettes by the retailer prior to sale. RCW 82.24.030, -.040, -.050 (*see* A.186). In the event the retailer affixes stamps himself, he will be entitled to compensation at the rate of $1.85 per thousand packs of cigarettes. RCW 82.24.070 (*Id.*).

The Tribe and its licensed Indian retailers may possess unstamped cigarettes for purposes of resale to members of the Tribe. RCW 82.24.260 (Br. App. 26a). However, the statute requires licensed Indian retailers of the Tribe to collect cigarette excise taxes with respect to sales to non-members of the Tribe and remit the tax to the State. *See* WAC 458-20-192 (Br. App. 38a). This collection responsibility is accomplished by requiring reservation retailers to affix state tax stamps and collect and remit the cigarette excise tax to the State at the time of retail sale to non-Indian consumers. *See* ETB 504.08.192 (Br. App. 42a).

If the Indian seller, however, does not collect the tax from the non-Indian purchaser, the State may collect the tax directly from that purchaser; *see* RCW 82.24.020 and -.080. Further, that purchaser may be subject to criminal penalties; *see* RCW 82.24.110(4) and (5). And the cigarettes themselves may be seized as contraband; *see* RCW 82.24.130.

State statutes provide that unstamped cigarettes found within the state are to be declared contraband and subject to summary seizure and sale. RCW 82.24.130 (Br.

[7]The tax is imposed by three separate statutes. RCW 84.24.020 imposes a tax of 6.5 mills per cigarette; RCW 28A.47.440 imposes a tax of .5 mills per cigarette; and RCW 73.32.130 imposes a tax of 1 mill per cigarette. Thus, the total tax is .8 cents per cigarette or $1.60 per carton (200 cigarettes).

App. 24a). In the case of cigarettes being transported in interstate commerce into the State of Washington, this contraband requirement is not applicable where the cigarettes are consigned to a licensed wholesaler or retailer, the United States or any agency thereof, and any Indian tribal organization authorized to possess unstamped cigarettes. RCW 82.24.260 (Br. App. 26a). An Indian tribe is not "authorized" to possess unstamped cigarettes where "* * * it appears that sales of unstamped cigarettes to persons who are not enrolled members of a recognized Indian tribe are taking place, or have taken place, within the exterior boundaries of the reservation occupied by that tribe." RCW 82.24.040 (Br. App. 23a). Here, none of the Tribes are "authorized" to possess unstamped cigarettes because it is clear that sales to non-members of the Tribe have taken place.

Prior to the inception of this litigation, the State declared and seized as contraband unstamped cigarettes in the stream of interstate commerce bound for the Tribes' reservations (Colville Complaint, A.18-19; Pre-Trial Order, A.34-35). The State, unless restrained, will continue such seizures of unstamped cigarettes shipped from outside the State of Washington and destined for Indian reservations in the future (Pre-Trial Order, ¶2.10, A.35).[8]

2. **State Sales Tax.** The State also imposes a sales tax on the sale of tangible personal property and certain services at retail. RCW 82.08.020.[9] The sales tax is imposed upon the purchaser, and the retailer is required to collect the tax and remit it to the State. RCW 82.08.050[10]

[8]Prior to the inception of the *Yakima* litigation, the State assessed cigarette taxes directly against the Tribe, and attempted to collect these taxes by a summary distraint procedure authorized pursuant to RCW 82.32.235. (U.S. Complaint, ¶¶8-11, A.140-142). The State no longer contends that it may lawfully assess taxes against the Tribe and its wholesaling function because no tax liability arises until cigarettes are resold by tribally-licensed retailers to non-Indians. *See* A.187.

[9]Br. App. 19a.

[10]Br. App. 19a.

During the time relevant to this litigation, the sales tax rate (combined state-local) was 5 percent of the retail selling price.[11] It is undisputed that the legal incidence of the sales tax falls upon the purchaser, and that the sales tax applies to sales of cigarettes. The sales tax does not apply to sales to reservation Indians where delivery takes place upon the reservation. WAC 458-20-192.[12]

D. THE ECONOMIC EFFECT OF THE STATE TAXES UPON THE INDIAN SMOKE SHOPS.

On the Yakima reservation, there are seventeen Indian smoke shops (Pre-trial Order, ¶5.7, A.172-175). On the Colville reservation, there are fourteen (Pre-trial Order, ¶2.11, A.35-36). On the Lummi reservation, there are six (Pre-trial Order, ¶2.15, A.38). And on the Makah reservation, there is only one (Pre-trial Order, ¶2.18, A.39-40). The majority of the customers at these smoke shops are non-Indians (A.46, 176-177).

To keep their non-Indian clientele, the smoke shops need a competitive advantage over the non-Indian sellers of cigarettes. And that competitive advantage stems from the non-Indian customers' being able to purchase their cigarettes free from the state cigarette and sales tax.

All the plaintiff Tribes presented undisputed testimony to this effect. Thus, Dr. Herrmann, the economic expert for the Yakima Tribe, testified as follows with respect to the smoke shops on the Yakima Reservation:

> "I was quite interested in the demand elasticity situation when I was interviewing those smoke shops. And at the Triangle Smoke Shop I asked, 'Why did you charge $3.80 for a carton of cigarettes,' which was on that particular day of my visit for a particular carton that I was examining, a particular brand and so on — was the price. And I said, 'Why don't you raise the price? If it's $5. at Safeway in Yakima, why do you only charge $3.80.'

[11]RCW 82.08.020 (4.5% state tax rate); RCW 82.14.030 (.5% local sales tax rate).

[12]Br. App. 38a.

"And the response struck me as being very reasonable. There has to be a price incentive to offset the expense of driving from Yakima out to the reservation, plus the time of the individual that's involved. So that at $3.80 the average sale, I was told, tended to be between two cartons and four cartons at the Triangle Smoke Shop. There is just enough incentive for people to drive out from Yakima to buy cigarettes there. And that really was an explanation that the operator of the smoke shop felt made sense for that operation, and that it was market competitive to be offering those cigarettes at that price.

"Now by the time I got clear over to visit with Holt-Brewer on the eastern side of the reservation I found another kind of demand elasticity problem. His customers drive from the Tri-Cities, which is some 40 miles southeast of his smoke shop. And so, he simply isn't able to charge $3.80 a carton. And he told me that his average carton of cigarettes goes at $3.60 a carton.

"But more than that, the people in the Tri-Cities will go together. And so you'll have, if you will, pooled purchases. In other words, there would be four or five neighbors or friends and they'll all place their order. And then a single automobile will make that drive. And so the average size of sale, therefore, will also be larger. Holt-Brewer would sell six cartons, ten cartons or even more than ten cartons." (Deposition of Cyril C. Herrmann, *Yakima* case, pp. 23-24, A.234)

Dr. Herrmann later testified that in fact the average sale at the Holt-Brewer smoke shop was *twenty cartons of cigarettes.* (Herrmann Deposition, p. 47, A.250)

Dr. Herrmann described the potential impact on the smoke shops which would stem from imposition of the state taxes on their customers as follows:

"A. * * * [I]t would be a completely irrational act for a non-Indian buyer who can buy cigarettes at $5 a carton at Safeway in Yakima to drive all the way out to the reservation and then be asked to pay a higher price.

"I've testified earlier that the Indians require a lower price in order to offset the disadvantage they have of being remote from markets.

"So in order to get those automobiles that drive down Highway 97 to stop, there has to be a price incentive sufficient to offset the cost and the time inconvenience of driving out there to buy cigarettes.

"So that for them $3.80 per carton is very competitive with $5 at Safeway in Yakima.

"Q. In effect then the only way to attract these non-Indian customers to the reservation is to exempt the tribe from the duty of collecting the State tax?

"A. Well, that's one workable mechanism. That's the mechanism that's working at the present time.

"They need a lower price." (Herrmann Dep., pp. 46-47, A.249-250).

The locational disadvantages of the smoke shops, in short, must be overcome through the tax immunity of their non-Indian customers. Without the competitive advantage stemming from that tax immunity, the smoke shops would lose those customers, and be selling only to Indians.

E. THE STATE MOTOR VEHICLE EXCISE TAXING SCHEME.

The Colville, Lummi and Makah Reservations are each relatively remote, isolated and undeveloped. Most essential goods and services needed by Tribal members are located off the reservation and can only be reached by private automobile (Pre-trial Order, ¶¶2.25, 2.26, and 2.28, A.42-43, 44). Most Indian households on the reservations own at least one automobile and many households own two (*Id.*). The Tribes themselves own and operate numerous vehicles used in the furtherance of Tribal business (Pre-trial Order, ¶¶2.25, 2.26, A.42-43). The Colville Reservation has in excess of 5,000 miles of roads of all types, including state public highways (Pre-trial Order, ¶2.25, A.42-43). The Lummi Reservation has 40 miles of roads of all types, including county roads (Pre-trial Order, ¶2.26, A.43). The Makah Indian Reserva-

tion has 64 miles of roads of various types, but has no state highways or county roads (Pre-trial Order, ¶2.28, A.44). The roads on the Makah Reservation are built and maintained by the Bureau of Indian Affairs (Pre-trial Order, ¶2.23, A.42).

The State's motor vehicle excise tax is imposed pursuant to RCW 82.44.020.[13] It is an excise tax imposed upon the privilege of using a motor vehicle within the state. RCW 82.44.020. During the time relevant to this litigation, the annual amount of the tax was 2 percent of the fair market value of the motor vehicle. RCW 82.44.020.[14] The camper and travel trailer excise taxes are imposed pursuant to RCW chapter 82.50.[15] The camper and travel trailer excise tax is an annual excise tax imposed for the privilege of using campers and trailers in the State of Washington. RCW 82.50.400.[16] The tax is levied at an annual rate of 1 percent of the fair market value of the vehicle. RCW 82.50.410.[17] When the tax is paid, a license is issued entitling the camper or trailer to the use of the State's public highways. RCW 82.50.540.[18]

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[13]Br. App. 27a.

[14]Beginning on August 1, 1978, the rate was increased to 2.2 percent. Wash. Laws of 1977, 1st ex. sess., chapter 332, section 1.

[15]Br. App. 30a. At the inception of this litigation, RCW chapter 82.50 also imposed an excise tax upon "mobile homes". The State originally claimed the power to impose its vehicle excise tax upon mobile homes owned by reservation Indians. However, since mobile homes are, by their nature, intended to be used entirely within an Indian reservation, the State no longer claims that it may apply its vehicle excise tax to mobile homes owned by a Tribe or its reservation resident members so long as the mobile home is used entirely within reservation boundaries. *Bryan v. Itasca County*, 426 U.S. 373 (1976).

[16]Br. App. 30a.

[17]Br. App. 31a.

[18]Br. App. 32a.

III. ACTION OF THE THREE-JUDGE DISTRICT COURT.

The three-judge district court began by finding jurisdiction over the parties and subject matter of the action. Recognizing that Indian tax exemptions normally raise questions only under the Supremacy Clause, U.S. Const., Art. VI, cl. 2, the court nevertheless found that the Tribes' claims for relief raised a substantial federal question under the Commerce Clause (J.S. App. 14). This Commerce Clause claim was based upon the State's seizure as contraband of unstamped cigarettes moving in interstate commerce to the Tribes (*Colville* Pre-trial Order, ¶¶2.7-2.10, A.34-35; *Yakima* Pre-trial Order, ¶5.15, A.182-183).

On the merits, the court began by analyzing the state cigarette taxing scheme as applied to sales by reservation Indians to non-Indians. The court found that the legal incidence of the State's cigarette and sales taxes fell upon the non-Indian purchaser (J.S. App. 17-24). Thus, Washington's cigarette and sales taxing scheme was similar to Montana's cigarette taxing scheme at issue in *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976), *i.e.*, a tax imposed upon the purchaser to be collected by the seller.

The court next disposed of the Tribes' contentions that the State's cigarette taxing scheme had been preempted by federal legislation and policy underlying the Indian Traders Act, 25 U.S.C. §261 (1976), *et seq.*; the Indian Reorganization Act of 1934, 25 U.S.C. §476 (1976), *et seq.*; the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §450 (1976); and the Indian Financing Act of 1974, 25 U.S.C. §1451 (1976), *et seq.* The court found nothing in these acts which attempted to implement a federal policy by regulating a subject matter closely related to that touched on by the State's cigarette tax (J.S. App. 31-32).

The court disposed of the Tribes' claims that imposition of the State's cigarette tax on non-Indian

purchasers constitutes a "multiple burden" on Indian commerce. Relying upon *Moe, supra,* and *McClanahan v. Arizona State Tax Commission,* 411 U.S. 164 (1973), the court held that there is no "automatic exemption" from state taxation on Indian reservations under the Commerce Clause (J.S. App. 24-25). Similarly, in response to the Tribes' claim that imposition of the State's cigarette tax collection requirement violated due process of law, the court held that *Moe, supra,* foreclosed any such argument (J.S. App. 26).

The court then switched its focus from the validity of the collection requirement to the validity of the tax itself. And it held that the very imposition of the cigarette and sales taxes — and not just the collection requirement — was invalid. This holding was based upon two alternative theories. Under its first theory, the state taxes on purchases of cigarettes by non-Indians had been pre-empted by the passage of Tribal ordinances regulating and taxing the sale of those same cigarettes. Under the court's second theory, the imposition of the state taxes, on top of the Tribal taxes, interfered with the right of Indian self-government, as articulated in *Williams v. Lee,* 358 U.S. 217 (1959).

In the *Yakima* case, No. 3909, the court found that the state cigarette tax, as applied to non-Indians purchasing cigarettes from tribal retailers, was invalid for the same reasons discussed in the *Colville* case. The court found that the state sales tax, as applied to the sales of cigarettes, was preempted by the Tribe's cigarette taxing ordinance (J.S. App. 52-54). However, the court held that in the absence of a Tribal tax on sales of articles other than cigarettes, the State's sales tax was not preempted, and Indian retailers could be required to collect and remit the tax to the State (J.S. App. 54-55).

In addition to the issues surrounding state taxing power over non-Indians on Indian reservations, the court also ruled on one "enforcement issue" presented to it. That issue deals with the power of the State to impose

record keeping requirements upon Indian retailers reasonably necessary to ensure payment of taxes collected from non-Indians. The court held that state record keeping requirements set forth in ETB 504.08.291,[19] requiring Indian retailers to keep records of sales to Indians, were preempted by the Indian Traders Act, 25 U.S.C. §261 (1976), *et seq.* (J.S. App. 30). In the *Yakima* case, the court also held that the State could not impose a requirement that Indian retailers keep records of nontaxable sales of items other than cigarettes.[20] (J.S. App. 57-58). However, the court held that the State could require Indian retailers to keep records of taxable transactions, *i.e.*, sales to non-Indians. (J.S. App. 56-57).

Finally, the court held that the State could not impose its motor vehicle, travel trailer and camper excise taxes upon vehicles owned by the Tribes and their reservation resident members when such vehicles were driven partly on and partly off the reservation. The court found that Washington's vehicle excise taxes were no different in practical operation and effect from Montana's personal property tax on automobiles invalidated by this court in *Moe, supra* (J.S. App. 42). Judge Kilkenny, again in dissent, reached no conclusion as to the validity of the State's vehicle excise taxes. In his view the record was inadequate to rule on a tax falling between the on-reservation activities considered in *McClanahan, supra,* and the off-reservation activity considered in *Mescalero Apache Tribe v. Jones,* 411 U.S. 145 (1973).

In conformity with its opinion, the court subsequently issued separate declaratory judgments and decrees of permanent restraint. In the *Colville* case, No. 3868, the State was enjoined from imposing the cigarette tax upon non-Indians purchasing cigarettes from the Tribes or their licensed dealers; from requiring that sales to both Indians

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[19]Br. App. 42a.

[20]The basis of the court's ruling on this issue is not clear. Presumably, the court felt that the record keeping requirement was not "reasonable" and hence an interference with tribal self-government.

and non-Indians be reported; from acting in any manner to enforce the cigarette tax by confiscation or seizure of cigarettes owned, possessed or sold by the Tribes or their licensed dealers; from imposing the motor vehicle excise tax and the mobile home, travel trailer and campers excise tax upon the Tribes or their reservation resident members with respect to motor vehicles, mobile homes, travel trailers and campers used exclusively or in part on the reservation.[21] (J.S. App. 69).

In the *Yakima* case, No. 3909, the court enjoined the State from imposing its cigarette and sales taxes upon non-Indians purchasing cigarettes from tribally-licensed dealers; from requiring that cigarette sales to Indians and non-Indians be reported to the State; and from acting in any manner to enforce taxes by seizing or confiscating cigarettes owned, possessed or sold by the Yakima Nation and its licensed dealers (J.S. App. 73-74).

This appeal followed.

SUMMARY OF ARGUMENT

Only three years ago, in *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976), this Court held that the State of Montana could require operators of Indian tribal "smoke shops" to collect state excise taxes imposed on their non-Indian customers. The Court thus refused to sanction — because it was without foundation in federal law — an attempt by Indian Tribes to market to

[21]The court also enjoined the State from imposing its tobacco products tax (chapter 82.26 RCW) upon the Tribes or their licensed dealers, and imposing the Washington sales/use tax upon any of the Tribes or their reservation resident members with respect to mobile homes delivered to and located inside the exterior boundaries of the reservation. Neither of these two injunctive orders has been appealed. Unlike the cigarette tax, the legal incidence of the State's tobacco products tax falls upon the retailer. Under *McClanahan, supra*, the State is thus prohibited from imposing this tax. Similarly, the legal incidence of the State's sales/use tax falls upon the purchaser. To the extent that mobile homes are delivered to reservation resident members and are used exclusively on the reservation, no sales/use tax liability will arise. *McClanahan, supra.*

non-Indians a tribal immunity from state taxation.

These appeals from two separate three-judge district court decisions involve an identical attempt to market to non-Indians a tribal immunity from state taxation. The Tribes involved in this latest attempt were successful in convincing the district court majority that they had a right to immunize non-Indians from state taxation by the simple expedient of taxing this cigarette trade themselves. The central issue in these appeals, therefore, is whether Indian Tribes have such a right to market tribal tax immunities to non-Indians.

These appeals present two distinct jurisdictional questions and several distinct substantive questions. Because this Court has postponed jurisdiction to the hearing on the merits, we address these jurisdictional questions at the outset.

A. JURISDICTIONAL ISSUES.

1. This Court has jurisdiction of these appeals pursuant to 28 U.S.C. §1253 (1976) because a three-judge court properly convened pursuant to the former 28 U.S.C. §2281 (1970). A three-judge court is not required where the claim is "insubstantial" (*Goosby v. Osser*, 409 U.S. 512 (1973)), or presents only Supremacy Clause questions (*Swift & Co. v. Wickham*, 382 U.S. 111 (1965)). Although it is now clear that the question of on-reservation application and enforcement of state taxes on non-Indians presents only Supremacy Clause questions, at the time the three-judge district court was convened it appeared that substantial Commerce Clause issues were involved. It was not until this Court's decision in *Moe, supra*, that it became apparent that these Commerce Clause issues were insubstantial. More importantly, the United States and the Tribes in both the complaints and pre-trial orders sought injunctive relief against the enforcement of *state statutes* authorizing seizure as contraband of unstamped cigarettes moving in interstate commerce to the Tribes' reservations. This claim raises substantial Commerce Clause questions, thus requiring the convening of a

three-judge court in order to grant the requested relief. Accordingly, this case is properly before the Court on direct appeal.

2. This Court has jurisdiction of the motor vehicle excise tax issue involved in the *Colville* case. 28 U.S.C. §2101(b) (1976) requires that a notice of appeal be filed within sixty days of the entry of final judgment. Subsequent to the entry of the original judgment in *Colville*, the State made a timely Rule 59 motion for a partial new trial, directed to the cigarette and sales tax issue, but not to the motor vehicle excise tax issue. Sixty-eight days after entry of the original judgment, the district court denied the State's motion. The State subsequently filed a notice of appeal with respect to all substantive issues. A judgment is not final for purposes of computing the time for taking of an appeal until a motion for a new trial has been disposed of. *United States v. Ellicott*, 223 U.S. 524 (1912). The district court's original judgment — including that portion dealing with the motor vehicle excise tax issues — did not become final so long as the State's Rule 59 motion awaited decision. *See Weymouth v. Colorado Interstate Gas Co.*, 34 F.R.D. 4 (N.D. Tex. 1963), *aff'd*, 367 F.2d 84 (5th Cir. 1965). To hold otherwise would encourage piecemeal appeals of a single action, causing confusion, delay, and expense to the parties and the courts.

B. **SUBSTANTIVE TAX ISSUES.**

1. The major issue in these appeals is whether an Indian Tribe may oust the State of power to tax its non-Indian citizens purchasing cigarettes from Tribal retailers. The district court held that Tribal taxation of cigarette sales to non-Indians preempted a state tax imposed on non-Indian purchasers of cigarettes. Thus, the court not only deprived the State of the power to require Indian sellers to collect state cigarette taxes; it also deprived the power of the State to impose those taxes at all — a power which this Court in *Moe* characterized as "concededly lawful". *Moe, supra*, 425 U.S. at 483.

Although the court purported to rely upon two alternative theories for its holding, one based upon a concept of federal preemption and the other based upon a concept of tribal self-government, the application of both concepts was bottomed upon a simple economic fact. The imposition of the state excise taxes upon the non-Indian purchasers would remove the competitive advantage enjoyed by the Indian smoke shops and would thus severely diminish the revenue from the tribal tax imposed upon these cigarette sales ot non-Indians. To preserve this source of Tribal tax revenue, the court was required to strike down the State's tax. The court thus conferred upon the Tribes the power to bestow a tax immunity upon their non-Indian customers and in effect to market that immunity to them in return for their cigarette business. There is nothing in federal law which requires such an immunity for non-Indians.

First, the power of a state to impose its taxes upon non-Indians doing business with Indians has been consistently upheld by this Court. *Thomas v. Gay*, 169 U.S. 264 (1898). The fact that a Tribe may impose its tax upon that same business transaction should not be grounds for ousting the State of its sovereign power. The situation is nothing more than the classic case of two jurisdictions — each having taxing power — exerting that power against the same individual or transaction. Just as two sister states may each impose its own tax upon income earned in one state by the resident of another (*Maine v. New Hampshire*, 426 U.S. 660 (1976)), or upon the same item of personal property, if purchased in one state and used in another (*Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937)), so also the Tribe and the State each have the power to tax. The exercise of that power by one does not oust the power of the other. *Fort Mojave Tribe v. County of San Bernardino*, 543 F.2d 1253 (9th Cir. 1976), *cert. denied*, 430 U.S. 983 (1977). By allowing the Tribal tax to oust the State of its power to tax, the district court conferred upon the Tribes a power superior to that possessed by any state!

The district court found that the imposition of the State's tax would interfere with the "right of tribal self-government", citing *Williams v. Lee*, 358 U.S. 217 (1959). That case, however, is inapplicable because it merely preserves the immunity of reservation Indians from state law; it does not protect *non-Indians* from state law. Nothing in the concept of "tribal self-government" would allow an Indian Tribe to market *its immunity* from state law to non-Indians. Additionally, the Tribes have failed to demonstrate that elimination of cigarette sales as a revenue source would threaten the self-governing ability of the Tribes. There is no evidence that the Tribes will be unable to govern themselves if this revenue source becomes unavailable.

The district court also found that the Tribes' tax on cigarette sales preempted the State's tax. Asserting that in imposing their taxes, the Tribes were exercising federally delegated power under §16 of the Indian Reorganization Act of 1934, 25 U.S.C. §476 (1976), the court reasoned that imposition of the State's tax would conflict with the congressional purpose underlying the enactment of the IRA — revitalization of tribal self-government and fostering Indian economic development. However, §16 of the IRA delegates no powers to Indian Tribes, but at best merely "confirms" whatever powers Tribes already possessed. *United States v. Wheeler*, 435 U.S. 313 (1978). A tribal power to tax non-Indians is not a federally delegated power; it is at best based upon a treaty power to exclude non-Indians from the Tribes' reservations. Furthermore, the congressional purposes underlying the IRA do not dictate — expressly or by implication — a tax exemption for *non-Indians* dealing with reservation Indians. Far from evidencing a congressional intent that Indian enterprises be conferred with the competitive advantage which stems from a non-Indian's immunity from state taxation, the IRA adopts a policy of placing Indian businesses on an *equal competitive footing* with non-Indian enterprises. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973).

Moe, supra, stands for the proposition that Indian tribes have no recognized right — self-governing or by federal delegation — to market to non-Indians an immunity from state taxation. Judge Kilkenny, dissenting below, implicitly recognized this, and his view should prevail in this appeal.

2. The State may impose its cigarette and sales taxes upon Indians who are not members of the Tribe upon whose reservation the sale occurs. The federal government has not preempted the field of taxation with respect to Indians who have left their own reservations. Federal laws affecting these Indians, e.g., the Major Crimes Act, 18 U.S.C. §1153 (1976), and the Indian Reorganization Act, 25 U.S.C. §476 (1976), *et seq.*, do not dictate otherwise. Additionally, since these Indians are not members of the reservation tribe, and hence not subject to its control, no tribal self-government interest is affected.

C. ENFORCEMENT ISSUES.

1. The State may require Indian retailers to keep records of sales to both Indians and non-Indians. This record keeping requirement is reasonable and is necessary to assure compliance with the collection requirement found lawful in *Moe, supra*. Where Indian tribes and their licensed retailers establish a scheme primarily for the benefit of immunizing non-Indians from their obligations under state law, the burden of record keeping — even as applied to sales to Indians — is a reasonable one. The "burden" infringes upon no legitimate tribal interest and conflicts with no federal law. *Moe, supra*.

2. The State may seize as contraband unstamped cigarettes moving in interstate commerce to the Tribes' reservations in circumstances where the Tribes and/or their retailers have refused to collect cigarette taxes on sales to non-Indians. A state, in order to safeguard vital local interests, will be permitted to regulate interstate commerce if it does not unduly interfere with that commerce and is not in conflict with an area of regulation

totally preempted by Congress. *Carter v. Commonwealth of Virginia*, 321 U.S. 131 (1944). It is clear that the State has a vital interest in preventing the diversion of untaxed cigarettes into the hands of its non-Indian citizens. Because Congress has not preempted the field, this is a proper exercise of state power.

3. The State may enforce its cigarette tax by *on-reservation* seizures of unstamped cigarettes intended for resale to non-Indians. The clear import of *Moe, supra*, is that where Indians invite non-Indians onto the reservation to escape state law, the State may apply its police power to reservation Indians.

D. MOTOR VEHICLE EXCISE TAX ISSUE.

The State may impose its motor vehicle excise tax upon vehicles owned by a Tribe or its members when those vehicles are used on public highways outside the reservation. The motor vehicle excise tax is a true use tax, imposed for the privilege of *using* a motor vehicle. Thus, unlike the property tax on motor vehicles involved in *Moe, supra* — a tax on ownership — the legal incidence of the motor vehicle excise tax occurs wherever and whenever the vehicle is used. To the extent the vehicle is used outside the reservation, the legal incidence of the tax falls upon such use, and, under *Mescalero, supra*, the tax may be validly imposed.

ARGUMENT

I. THE APPEALS ARE WITHIN THE JURISDICTION OF THIS COURT PURSUANT TO 28 U.S.C. §1253 ON THE BASIS THAT THE ORIGINAL ACTIONS WERE PROPERLY WITHIN THE JURISDICTION OF A THREE-JUDGE DISTRICT COURT PURSUANT TO 28 U.S.C. §2281

A. INTRODUCTION.

By motion filed with the Court on February 12, 1979, the Solicitor General sought to have the appeal in No. 3909 below (the *Yakima* case) dismissed for lack of jurisdiction. On February 14, 1979, the State filed a Brief Opposing United States Motion to Dismiss. On February 21, 1979, the Court entered an order reading as follows:

> "Further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits." (A.255)

Accordingly, in this portion of our brief, we will respond more fully to the Solicitor General's arguments in *Yakima* on the question of jurisdiction. In so doing, we will be referring as well to No. 3868 below (the *Colville* case). As the Court apparently recognized in its order of February 21, 1979 (which by its terms encompasses both *Yakima* and *Colville*) the jurisdictional question raised by the Solicitor General is also present in *Colville*.[22]

Colville was commenced on May 17, 1973, and *Yakima* was commenced on July 18, 1973 (A.1, 138). As of those dates, 28 U.S.C. §2281 (1970) read as follows:

> "An interlocutory or permanent injunction *restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute* or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof *upon the ground of unconstitutionality of such statute* unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title." (Emphasis supplied)

Although this provision was later repealed by Act of August 12, 1976, Public Law 94-381, § 1, 90 Stat. 1119,

[22]The Tribes in *Colville* have not raised this same jurisdictional question. *Colville*, however, involves the same critical legal issues, including the issue of the constitutionality under U.S. Const., Art. I, Sec. 8, cl. 3 (Commerce Clause) of the state statutory scheme dealing with contraband cigarettes moving through the state from outside to destinations within the state but within Indian reservations as well. (RCW 82.24.130).

these actions were not affected since they were both pending on the date of the repeal. *Accord*, § 7 of Public Law 94-381, *supra*.

B. ARGUMENTS OF SOLICITOR GENERAL.

Nevertheless, and in spite of the fact that it was the United States which originally invoked 28 U.S.C. §2281 (1970), *supra* (A.145), the Solicitor General now argues as follows:

(1) That No. 3909, which the United States initiated, should, instead, have been heard and determined by a single federal district court judge; and, therefore,

(2) That the appeal in No. 3909 does not fall within the ambit of 28 U.S.C. §1253 (1976)[23] and, accordingly, should be dismissed.

The Solicitor's argument focuses, as it must, on §2281 and is essentially two-pronged. The first prong involves state enforcement efforts within the reservations and the second pertains to enforcement efforts outside those reservations. Initially, it is argued that under *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973), and *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), the challenges by the United States and the Tribes to *on-reservation* application and enforcement of the state cigarette and sales taxes present only Supremacy Clause issues which do not fall within the scope of §2281. *See Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S.

[23]Section 1253 reads as follows:

"Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding *required by any Act of Congress to be heard and determined by a district court of three judges.*" (Emphasis supplied)

463, 481, n. 17 (1976).[24] Then, secondly, it is argued that the challenges to *off-reservation* enforcement of the State's cigarette taxes, through seizure of unstamped cigarettes en route to the reservation, likewise do not fall within the scope of §2281, even though the State's off-reservation enforcement efforts clearly raise a Commerce Clause issue — and not just a Supremacy Clause issue.

C. RESPONSE TO ARGUMENTS OF SOLICITOR GENERAL.

1. Preliminary observations.

We will take up each argument in turn. But before so doing, two preliminary observations seem appropriate. First, the United States has offered no policy reasons — and we know of none — to delay ultimate resolution of the enormously important substantive issues raised in this appeal. Further delay will only serve to exacerbate the controversy between the parties and will contribute nothing to its correct resolution. There is no reason to believe that this Court will benefit from additional analysis by the Court of Appeals — the issues were fully briefed by the parties and the court below entered an exhaustive opinion.

Secondly, with the repeal of 28 U.S.C. §2281 in 1976, there is no longer any need for concern about minimizing this Court's mandatory docket in the interest of judicial administration. The policy reasons which have in the past prompted the Court to apply §2281 as narrowly as possible no longer exist.

2. Taxation of on-reservation activities.

We turn, next, to the argument based upon footnote

[24]In describing this first prong of attack upon the Supreme Court's jurisdiction the term "assumption" is probably more accurate than "argument". The Solicitor General merely assumes — as indeed did the district court itself (J.S. App. 14) — that under footnote 17 in *Moe* no substantial Commerce Clause issue could be presented, for purposes of §2281, with respect to on-reservation application and enforcement of the taxing statutes. We here challenge that assumption.

17 in *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 481 (1976). The focus here is the same as in *Moe*, *i.e.*, upon the application and enforcement of the cigarette tax within the reservation itself.

In *Moe*, this Court barred the application of the Montana personal property tax to on-reservation Indian-owned automobiles. It also barred the application of the Montana cigarette tax to on-reservation sales by Indians to other Indians. After citing *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973), and *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), as the basis for its holding, the Court stated in footnote 17:

> "It is thus clear that the basis for the invalidity of these taxing measures, which we have found to be inconsistent with existing federal statutes, is the Supremacy Clause, U.S. Const., Art VI, cl 2, and not any automatic exemptions 'as a matter of constitutional law' either under the Commerce Clause of the intergovernmental-immunity doctrine as laid down originally in *M'Culloch v. Maryland*, 4 Wheat. 316 (1819). If so, then the basis for convening a three-judge court in this type of case has effectively disappeared, for this Court has expressly held that attacks on state statutes raising only Supremacy Clause invalidity do not fall within the scope of 28 USC § 2281. *Swift & Co. v. Wickham*, 382 U.S. 111 (1965). Here, however, the District Court properly convened a § 2281 court, because at the outset the Tribe's attack asserted unconstitutionality of these statutes under the Commerce Clause, a not insubstantial claim since *Mescalero* and *McClanahan* had not yet been decided. See *Goosby v. Osser*, 409 U.S. 512 (1973)." 425 U.S. at 481.

The Solicitor General asserts that, pursuant to this footnote, the attack by the United States and the Tribes upon the on-reservation application and enforcement of Washington's cigarette and sales taxes did not require a three-judge court. We submit, to the contrary, that the same policy considerations which caused this Court to sustain the convening of a three-judge district court in

Moe, supra, notwithstanding *McClanahan* and *Mescalero*, are equally applicable here.

In the first place, it will be noted that neither *McClanahan* nor *Mescalero* involved the question of a three-judge federal district court at all. The reason for this, quite simply, was that neither of those cases originated in federal court. Instead, *McClanahan* was a state court case from Arizona in which a decision of the Arizona Court of Appeals[25] was reviewed (and reversed) by this Court pursuant to a writ of certiorari. And similarly, *Mescalero* involved a decision of the New Mexico Supreme Court[26] which, again, came to this Court by certiorari rather than appeal. Thus it was not until three years after *McClanahan* and *Mescalero* that this Court in *Moe, supra*, delivered the message that is critical here, *i.e.*, that a case such as *McClanahan* or *Mescalero*, if commenced in federal court instead of state court, does not (or more properly, did not) fall within the purview of 28 U.S.C. §2281, *supra*.

Bearing that in mind, our point here will readily be seen from the following time table:

Prior to 3/27/73—Three-judge court convened in *Moe*
3/27/73—*McClanahan* and *Mescalero* decided, U.S. S.Ct.
5/17/73—No. 3868 (*Colville*) filed (USDC)
6/18/73—Three-judge court convened in No. 3868
7/18/73—No. 3909 (*Yakima*) filed (USDC)
7/20/73—Three-judge court certified in No. 3909
5/10/74—*Moe* decided by three-judge district court
4/27/76—*Moe* decided by U.S. S.Ct.
3/28/77—Oral Argument in No. 3868 and No. 3909
2/22/78—No. 3868 and No. 3909 decided
5/10/78—Final Orders entered in Nos. 3868 and 3909

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[25] *McClanahan v. State Tax Comm'n*, 14 Ariz. App. 452, 484 P.2d 221 (1971).

[26] *Mescalero v. Jones*, 83 N.M. 158, 489 P.2d 666 (1971).

Because *McClanahan* and *Mescalero* had not been decided when the three-judge district court in *Moe* was first convened, whatever message was to be derived from those cases regarding the necessity for such a court was ruled by this Court to be inapplicable to that case.[27] But because neither *McClanahan* nor *Mescalero* were federal court cases at all it took this Court's decision in *Moe* to deliver that message. And that did not occur until April 17, 1976, more than three years after *McClanahan* and *Mescalero* were themselves decided. Long before, however, the three-judge court in both *Colville* and *Yakima* had been convened and had commenced functioning.

The Solicitor General, we presume, would nevertheless argue that the message should have been clear on March 27, 1973, the date *McClanahan* and *Mescalero* were decided by this Court. The argument would be that the opinions in *McClanahan* and *Mescalero* themselves, together with *Swift & Co. v. Wickham*, 382 U.S. 111 (1965), should have been sufficient to deliver that message, completely unaided by footnote 17 in *Moe*.

Such an argument, we agree, would have force if *McClanahan* had clearly held (or even stated in *dicta*) that the Commerce Clause was not an independent and automatic source of immunity from state taxing statutes as applied on Indian reservations. In *Mescalero*, of course, the Court had clearly held exactly that with respect to the doctrine of intergovernmental immunity — for it upheld the New Mexico gross receipts tax which had been challenged on the basis of that doctrine. But did the Court do the same thing in *McClanahan* with respect to the Commerce Clause? We suggest that it did not. And the reason it did not is simply that it was not in any way required to do so; for the question was not really before it.

The opinion in *McClanahan*, we recognize, discussed extensively various treaty and statutory provisions as the basis for its decision. But it also stated, at 411 U.S. 164, 172, n. 7:

[27] 425 U.S. 463, 481, n.17, *supra*.

> "The source of federal authority over Indian matters has been the subject of some confusion, but it is now generally recognized that the power derives from federal responsibility for regulating commerce with Indian tribes and for treaty making. See U.S. Const. Art. I, § 8, cl. 3; Art. II, § 2, cl. 2. * * *"

Does the Indian Commerce Clause, however, constitute *solely* a source of congressional authority and thus remain ineffective as a bar to state laws unless and until Congress exercises that authority? Or, on the other hand, does that clause create, automatically, certain immunities from state law which exist independently of congressional action and which continue to exist until congressional action eliminates them? Or, thirdly, does that clause, like the interstate Commerce Clause, do some of both? *Cf., Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1851).

The Court in *McClanahan* would have been faced with these questions if the case had originated as an injunctive action in the federal courts, for it would then have had to answer them in the context of determining the applicability of §2281. However, as we have already seen, the case originated instead in state courts; further, it was a refund action and not an injunctive action at all.

The Court in *McClanahan* would have also been faced with these questions had it there first determined that no bar to state taxation had been created by congressional action, in various treaty and statutory provisions. But the Court determined just the opposite, *i.e.*, that those provisions created such a bar. And, accordingly, the Court did not have to go on to address the question of whether the Indian commerce clause, by itself, created a similar bar.

Of course it is *now* clear, after *Moe*, that the clause is solely a source of congressional authority which creates no automatic bar to state tax law, at least so far as on-reservation application of that law is concerned. But that proposition was not clear from the *McClanahan* decision on March 27, 1973. Moreover, clarity on this precise question was not greatly enhanced, in our view at

least, when this Court stated on the same date, in *Mescalero*:

> "* * * in the special area of state taxation, absent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation, *and McClanahan v. Arizona State Tax Comm'n, supra, lays to rest any doubt in this respect by holding that such taxation is not permissible absent congressional consent.*" 411 U.S. at 148 (Emphasis supplied).

This statement is a completely correct description of *McClanahan* — and that is precisely what creates the problem. The statement does not necessarily say that under *McClanahan* the on-reservation tax immunity can be found only on the basis of specific congressional action. On the contrary, by its use of the word "consent" it suggests that the function of congressional action is to remove such barriers to state tax laws as have been already established through some other source (such as the Indian commerce clause) and not to erect those barriers in the first place.

In short, while *McClanahan* and *Mescalero* clarified certain points, it took *Moe* to assemble the pieces and complete the picture. On the precise question of the effect of the Indian commerce clause, those two earlier decisions were not nearly so clear on March 27, 1973, when originally rendered, as they later became on April 27, 1976, the date of the decision in *Moe*. Therefore, we submit that the controlling date should be the later one and, under the *Moe* rationale, there was thus no need to disband the three-judge court after that date or to treat that court now as a single-judge court for purposes of this appeal.[28]

[28] *See also, Goosby v. Osser*, 409 U.S. 512 (1973), the final case cited in *Moe*, footnote 17, *supra*, wherein the following test was enunciated:

> "Title 28 U.S.C. §2281 does not require the convening of a three-judge court when the constitutional attack upon the state statutes is insubstantial. 'Constitutional insubstantiality' for this purpose has been equated with such concepts as 'essentially fictitious,' *Bailey v. Patterson*, 369 U.S., at 33; 'wholly insubstantial,' *ibid.*; 'obviously frivolous,' *Hannis Distilling Co. v. Baltimore*, 216 U.S. 285, 288 (1910); and 'obviously without merit,' *Ex parte Poresky*, 290 U.S. 30, 32 (1933). The limiting words 'wholly' and 'obviously' have cogent legal significance. In the context of the effect of prior decisions upon the substantiality of constitutional claims, those words import that claims are constitutionally insubstantial only *if the prior decisions inescapably render the claims frivolous*; previous decisions that merely render claims of doubtful or questionable merit do not render them insubstantial for the purposes of 28 U.S.C §2281. A claim is insubstantial only if ' "its unsoundness *so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference* that the questions sought to be raised can be the subject of controversy." ' *Ex parte Poresky, supra*, at 32, quoting from *Hannis Distilling Co. v. Baltimore, supra* * * * ." 409 U.S. at 518 (Emphasis supplied).

3. Off reservation seizures.

The Solicitor General's second, and principal, argument focuses upon the off-reservation enforcement actions of the Department of Revenue. In evaluating this argument, let us first examine the relief which the United States (in *Yakima*) and the various Tribes (in *Colville*) requested in their complaints and in the pre-trial orders which, by their terms, superseded the complaints. *See Yakima* Pre-trial Order, A.199; *Colville* Pre-trial Order, A.59.

The relief requested in both *Yakima* and *Colville* was directed to a very practical problem. The State was seizing shipments of unstamped cigarettes while they were en route from out-of-state suppliers to the various Indian reservations. The pre-trial orders identify four such off-reservation seizures, all of which occurred before the filing of the respective complaints.[29] The pre-trial orders also show that the State fully intended to continue such

[29] *See Yakima* Pre-trial Order, ¶5.15, A.182-183; *Colville* Pre-trial Order, ¶¶2.8-2.9, A.34-35. The State's attempt was, quite simply, to cut off the out-of-state supply of cigarettes. The State had by this time cut off the supply from in-state sources and the Tribes, accordingly, had turned to out-of-state suppliers.

seizures.[30] Thus, as would be expected the request for injunctive relief in each of the two cases was carefully framed to include relief against such further seizures. In *Yakima*, the United States requested an injunction:

> "* * * against defendant, its agents, officers and employees enjoining them from engaging in any action or acting in any manner to * * * *stop, prevent or interfere with the transport or delivery of properties purchased by the Yakima Indian Nation for delivery to the Yakima Indian Reservation* * * * and enjoining defendant from acting in any manner to seize or to receive into its possession any of the properties of the Yakima Nation *being moved or which may be moved or* transported in commerce. * * *" (Emphasis supplied) U.S. Complaint, Prayer, ¶d, A.143.

And in *Colville*, the plaintiff Tribes requested an injunction:

> "* * * restraining defendants, their agents, employees, servants, officers, successors and all persons in active consort or participation with them from attempting to assess cigarette excise taxes on sales of cigarettes on Indian reservations, *seizing cigarettes* on said reservations or *enroute to said reservations through the State of Washington* * * *" (Emphasis supplied) Complaint, ¶6.4, A.11.[31]

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[30] *See Yakima* Pre-trial Order, ¶5.15, A.183; *Colville* Pre-trial Order, ¶2.10, A.35.

[31] The pre-trial orders likewise focused directly on the question of the State's power to make these off-reservation seizures. Thus, in *Yakima*, the United States characterized a part of its requested relief as follows:

> "*Threatened Seizure of Shipments to Tribe.* Against the State, its agents, officers and employees for their allegedly wrongful and unlawful acts in threatening to seize as contraband cigarettes and tobacco products upon which state taxes have not been paid being shipped from outside the State to the Tribe intended for resale to licensed Indian retailers on trust property within the Yakima Indian Reservation for eventual resale to persons who are not members of the Tribe." Pre-Trial Order, ¶2.2, A.169.

The United States contended:

> "The seizure of unstamped cigarettes being transported to the Yakima Indian reservation in commerce by the State of Washington to enforce collection of cigarette taxes on sales by licensed Indian retailers to non-Indians is a violation of the commerce clause and the supremacy clause of the Constitution." Pre-Trial Order, ¶7.12, A.190.

In response, the State contended:

> "Washington may classify as 'contraband' unstamped cigarettes owned by the Tribe and intended for ultimate resale by tribally-licensed retailers to non-members of the Tribe in violation of state law, and may seize and sell such cigarettes in the manner prescribed by state law, whether such cigarettes are held on plaintiff-intervenor's Indian reservation or are in transit in interstate commerce to plaintiff-intervenor's Indian reservation from points outside the state." Pre-Trial Order, ¶9.5, A.195.

Likewise, in *Colville*, the pre-trial order reflected the following contention by the Tribes:

> "* * *
>
> "An injunction should issue restraining defendants, their agents, employees, servants, officers, successors and all persons in active consort or participation with them from attempting to assess cigarette taxes on sales of cigarettes on plaintiffs' Indian reservations, *seizing cigarettes on such reservations or en route to such reservations through the State of Washington*, attempting to influence cigarette wholesalers not to sell to plaintiffs and in any way attempting to tax or interfere with the cigarette merchandising activities on plaintiffs' reservations." (Emphasis supplied) Pre-Trial Order, ¶3.16, A.50.

In requesting this relief, of course, the United States and the Tribes recognized the obvious: in making these seizures, the Department of Revenue was enforcing state law in the form of specific state taxing statutes. Stated otherwise, the Director of Revenue did not just decide one morning that, having nothing better to do that day, he would spend it making cigarette seizures. Rather, *he was doing his statutory duty.* And to stop him, the United States and the Tribes recognized that they had to obtain from the District Court a declaration that the statutes under which he was acting were invalid as applied to the Tribes' merchandising activities. Accordingly, the pre-trial order in *Yakima* states:

> "The Tribe seeks to have RCW Chapter 82.08 [sales tax], 82.12 [use tax], *82.24 [cigarette tax]* and 82.26 [tobacco products tax] * * * as it affects sales by

> Indians on the Yakima Indian Reservation *declared void.*" (Emphasis supplied) Pre-trial Order, ¶3.3, A.170.

And on what legal basis were all these statutes to be "declared void"? Because, as applied to Indians, they violated the Commerce Clause. Thus, under the "Contentions of Plaintiff United States" as set forth in the pre-trial order, the first contention is that:

> "This case is within the jurisdiction of a three-judge court under 28 USCA § 2281 *because of the challenge to the state taxing statutes under the commerce clause of the Constitution.*" (Emphasis supplied) Pre-trial Order, ¶7.1, A.188. *Cf.*, ¶7.2-7.5, A.188-189.

Likewise in *Colville*, the Tribes contended:

> "The actions of defendants in enforcing *the cigarette tax provisions of RCW ch. 28.24* as applied to plaintiffs constitute *unconstitutional burdens on Indian commerce in violation of Article I, Sec. 8, Cl. 3 of the United States Constitution.*" (Emphasis supplied) Pre-trial Order, ¶3.15, A.50.

In short, in terms of §2281, *supra*, the United States in *Yakima* and the plaintiff Tribes in *Colville* were asking for an "* * * injunction restraining the enforcement of * * * State statutes" — as contained in chapter 82.24 RCW. The "action of any officer of such State in the enforcement or execution of such statute" which was to be restrained was the action of the Director of Revenue and his employees, taken pursuant to chapter 82.24 RCW, both in seizing cigarettes off the reservation and in enforcing the cigarette tax within the reservation. And lastly, the "ground of the unconstitutionality of such statute[s]," insofar as off-reservation seizures were concerned, was the Commerce Clause. Moreover, it seems clear that the United States Attorney fully realized all this when he stated, in his petition for a three-judge court:

> "COMES NOW Dean C. Smith, United States Attorney for the Eastern District of Washington on behalf of the plaintiff United States of America and petitions the court for a determination in this cause by a three judge court under the provisions of 28 USC §§2281 and 2284.
>
> "This petition is based upon the allegations of the complaint in which the relief requested is a preliminary injunction as well as a permanent injunction *restraining the enforcement of a state statute. Such relief is requested on the grounds of the unconstitutionality of a state statute.*" (Emphasis supplied)[32] A.145.

In nevertheless arguing that the district court erred in giving the United States precisely what it thus asked for (A.146), the Solicitor General now contends, at pp. 9-10 of his Motion to Dismiss:

> "The district court's analysis ignored the distinction between 'a petition for injunction on the ground of the unconstitutionality of a *statute*, either on its face or as applied' — which requires the convening of a three-judge court under Section 2281 — and 'a petition seeking an injunction on the ground of the unconstitutionality of the *result* obtained by the use of a statute not attacked as unconstitutional,' which does not require a three-judge court. *Turner v. Fouche*, 396 U.S. 346, 353-354 N. 10 (1970) (emphasis in the original)."

Let us see who really ignored this declaration — the district court or the Solicitor General.

Admittedly, §2281 was a legal minefield which could be detonated by any number of "slippery distinctions." S. Rep. No. 94-204, 94th Cong., 1st Sess., 1975, p. 5 *reprinted*

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[32]The Solicitor General acknowledges that the United States requested a three-judge court, but now asserts that it did so only on the basis that "* * * such a court was needed to hear the Tribe's claim that *on-reservation sales* were exempt from state taxation." U.S. Motion to Dismiss, p. 8, n. 3 (Emphasis supplied). No citation to the record is given to support this assertion — and for good reason: such a citation cannot be found. Indeed, the complaint of the United States, the pre-trial order, and the United States' petition for a three-judge court, quoted above, all show that the present assertion of the Solicitor General is simply a post-trial concoction, served up for consumption by this Court. We are not so inexperienced as to expect consistency from the Justice Department; but we still indulge the hope that the Department would describe its prior inconsistent positions with a modicum of accuracy.

in [1976] U.S. CODE CONG. & AD. NEWS, 1988. But the distinction made by this Court in footnote 10 in *Turner* is not one of them.[33] That distinction is reasonably clear and well-developed. Moreover, it is shown by the same case authority as is cited by the Solicitor General at pp. 9-12 of his Motion to Dismiss. Simply put, if a state official is on essentially a "frolic of his own" — to borrow a term from tort law — a three-judge court is not required. Stated otherwise, for a three-judge court to be convened the administrative action which is challenged as unconstitutional must be attributable to an unconstitutional *legislative* decision, rather than merely an unconstitutional decision of the individual state officer. The "* * * [administrative] action complained of" must be "directly attributable to the statute." *Ex parte Bransford*, 310 U.S. 354, 361 (1940).

Thus, for example in *Bransford* an Arizona statute directed county assessors to do what assessors always do, *i.e.*, to value property. A bank then challenged *the actions* of the assessor in placing certain values on its stock, asserting that the values determined by the assessor were unconstitutionally discriminatory and excessive. The bank also asserted that the values were unauthorized by the statute itself. In response, this Court held that a three-judge court was not required to hear such challenges because the statute itself was not being challenged — as indeed it was not. In short, the assessor, rather than the legislature, made the alleged mistake.

Similarly in *Phillips v. United States*, 312 U.S. 246 (1941), the Governor of Oklahoma called out the Oklahoma National Guard and ordered it to occupy and stop construction on a federally financed dam project. The United States then filed an action in federal district court to enjoin him from interfering with the construction. The Governor argued that a three-judge court was necessary

[33] As we show, however, at p. 49, *infra*, the Solicitor General does not quote in full the relevant portion of footnote 10 in *Turner* and thereby misses the whole point of that footnote.

because he was acting under Oklahoma laws which made him commander in chief of the militia and directed him to cause the laws to be faithfully executed. The Court, however, rejected that argument, saying:

> "But an attack on lawless exercise of authority in a particular case is not an attack upon the constitutionality of a statute conferring the authority even though a misreading of the statute is invoked as justification." 312 U.S. at 252.

But now, let us contrast the situation in *Bransford* and *Phillips* with that presented here. When the Department of Revenue made three seizures involved in *Colville*, it was acting pursuant to a specific statute, RCW 82.24.130 (Br. App. 24a). That statute told the Department exactly what it was to do, as follows:

> "Subject to the provisions of RCW 82.24.250, any articles taxed herein found at any point within this state, which articles shall be held, owned or possessed by any person, and not having the stamps affixed to the packages or containers are hereby declared to be contraband goods, and may be seized by the department of revenue, or its duly authorized agent, or by any peace officer of the state, when directed by the department of revenue so to do, without a warrant, * * * ." RCW 82.24.130.

It was thus the enforcement of this statute which touched off the litigation in *Colville*. *See* ¶¶2.8 and 2.9 of the pre-trial order in *Colville*, explicitly stating that the three seizures there made were pursuant to this statute (A.34-35).

Conversely, in *Yakima* the off-reservation seizures which touched off the litigation were made pursuant to a different statutory procedure under which a tax warrant is first issued (RCW 82.32.210) and then, on the basis of the tax warrant, a "notice to withhold and deliver" is issued under RCW 82.32.235 to those holding property of the taxpayer. These statutory provisions are incorporated into the cigarette tax law by RCW 82.24.230 and were used to seize from a trucking company cigarettes belonging to the

Yakima Nation. *See* Amended Complaint, ¶¶9-11 (A.160-161).[34]

Admittedly, "[t]here is, of course, no state statute at issue which provides specifically for the seizure of goods moving in interstate commerce." U.S. Motion to Dismiss, p. 10. The statutes pursuant to which the seizures were made in *Colville* and *Yakima* provide for seizure of goods which are moving—or for that matter, resting—anywhere in the state; they do not single out goods moving in interstate commerce. But similarly, the South Carolina taxing statutes under challenge in *Query v. United States*, 316 U.S. 486 (1942), and the Colorado taxing statute under challenge in *Department of Employment v. United States*, 385 U.S. 355 (1966), did not in any way single out or even mention federal instrumentalities. Yet a three-judge court was required to be convened in both of those cases to determine whether those statutes could constitutionally be applied to federal instrumentalities (such as an Army Post Exchange, as in *Query*, or the American Red Cross, as in *Department of Employment*). Thus, contrary to the assertion of the Solicitor General, this case is indistinguishable from those two cases. *See* U.S. Motion to Dismiss, pp. 10 and 11, n. 6.[35]

Finally, the argument of the Solicitor General here is essentially the same as the argument of the appellees in *Turner v. Fouche*, 396 U.S. 346 (1970), a case upon which the Solicitor General purports to rely. The appellees in *Turner* contended that a three-judge court was not required, just as the Solicitor General contends here. This

[34]The Department, in fact, had done more than make this single seizure. By serving similar notices to all truck lines serving the Yakima Reservation, the Department had completely cut off the supply of cigarettes for the Yakima cigarette operation. Amended Complaint, ¶11, A.161. Hence, the litigation was commenced in *Yakima*.

[35]The point made by this Court in *Query* is equally applicable here: "And this [case] is not, like *Phillips v. United States*, 312 U.S. 246, a case in which the state officials threatened to engage in conduct which state law could not reasonably be construed to authorize." 316 U.S. at 490.

Court rejected that contention, however, for reasons which are applicable here—as we now demonstrate by quoting *in full* the third paragraph of footnote 10 in *Turner* from which the Solicitor only quoted part at pp. 9-10 of his Motion to Dismiss, *supra*.

> "*The appellees also propose a distinction between attacks on statutes and attacks upon the results of their administration, and urge that the appellants' case comes within the latter category. But this argument overlooks the line, delineated by our past decisions, that falls between* a petition for injunction on the ground of the unconstitutionality of a *statute*, either on its face or as applied, which requires a three-judge court, and a petition seeking an injunction on the ground of the unconstitutionality of the *result* obtained by the use of a statute not attacked as unconstitutional." (Citing cases, including *Query* and *Bransford*) 396 U.S. at 353, n. 10.[36]

Attacks upon the results of the administration of statutes require a three-judge court, as shown in *Turner*, where those results are directly attributable to the statutes—as was the case in *Turner*. That is also the case here. The second prong of the Solicitor General's attack on this Court's jurisdiction therefore must be rejected along with the first.

II. ALL ISSUES RAISED BY THE STATE IN *COLVILLE* WERE TIMELY APPEALED TO THIS COURT.

This issue involves only the *Colville* case and was raised by the Motion of Appellee Colville Conf. Tribes [et al.], pp. 8-9 thereof. The events giving rise to the issue are not in dispute and can be summarized as follows: The three-judge district court entered its declaratory judgment and decree of permanent restraint in No. 3868 on May 10, 1978 (J.S. App. 66-70). The State made a timely motion for partial new trial pursuant to Fed.R.Civ.P. 59(a) on

[36]The material which we have underscored forming the first half of the quotation was not quoted by the Solicitor General. The emphasis on the two words "statute" and "result" was the Court's in *Turner*.

May 19, 1978 (A.130).[37] This motion addressed the issue of the State's ability to apply and enforce its cigarette and sales taxes with respect to sales by the Tribes to non-Indians. The three-judge district court, on July 17, 1978, entered an order denying the State's motion for partial new trial (J.S. App. 77-78). On August 14, 1978, the State filed a notice of appeal in No. 3868 dealing with those cigarette and sales tax issues (A.133-134). On September 8, 1978, the State filed an amended notice of appeal in No. 3868 adding the motor vehicle excise tax issues and Public Law 83-280 issues to the cigarette and sales tax issues originally appealed on August 14, 1978 (A.135-136).[38]

[37]FED.R.CIV.P. 59(b) requires that a motion for new trial be *served* within ten days after entry of the judgment. Although the motion was filed with the district court on May 22, 1978 (12 days after entry of judgment), it was timely served by mail on May 19, 1978. *See* Aff. of Service, Mot. for Partial New Trial, p. 1, R; FED.R.CIV.P. 5(b). Where service of a Rule 59 motion is made by mail, it need only be filed with the court within a reasonable time following service. FED.R.CIV.P. 5(d); *Parks v. Ford*, 68 F.R.D. 305 (D. Pa. 1975). *But see Sutherland v. Fitzgerald*, 291 F.2d 846 (10th Cir. 1961). In any event, the tenth day following the entry of the judgment in this case, May 20, 1978, was a Saturday. The motion was both served and filed by the following Monday, May 22, 1978, and thus is timely. FED.R.CIV.P. 6(a).

[38]In No. 3868, the State had first filed a notice of appeal on July 12, 1978, dealing with the motor vehicle excise tax issues and Public Law 83-280 assumption of jurisdiction issues (A.131-132). But, as argued here, a motion for a new trial, timely filed, terminates the running of the time for filing a notice of appeal until disposed of. *United States v. Ellicott*, 223 U.S. 524, 538-39 (1912); *United States v. Seminole Nation*, 299 U.S. 417 (1937). Therefore, an appeal predicated upon the State's July 12, 1978 notice would have been premature and subject to dismissal for want of finality. *United States v. Crescent Amusement Co.*, 323 U.S. 173, 177 (1944); *Kingman v. Western Mfg. Co.*, 170 U.S. 675, 678 (1898). Such a cautionary notice of appeal filed while a Fed.R.Civ.P. 59 motion for a new trial was pending is a nullity. *See Ohio Public Service Co. v. Fritz*, 274 U.S. 12 (1927). *Accord, Turner v. HMH Pub. Co.*, 328 F.2d 136 (5th Cir. 1964); *Napier v. Delaware, L. & W. R. Co.*, 223 F.2d 28 (2d Cir. 1955); *Sampson v. Ampex Corp.*, 335 F.Supp. 242 (S.D.N.Y. 1971), *aff'd*, 463 F.2d 1042 (2d Cir. 1972).

Thus, this Court's jurisdiction of the motor vehicle excise tax issues depends upon the timeliness of the State's notice of appeal filed on September 8, 1978. The critical question to be answered is whether the State's motion for a partial new trial suspended the finality of the three-judge district court's judgment until the date of entry of the court's order denying that motion on July 17, 1978. If the answer to this question is affirmative, the motion vehicle excise tax issues have been timely appealed because these issues were contained in the State's amended notice of appeal in No. 3868[39] which was filed within 60 days of the filing of the lower court's order denying the motion for partial new trial. 28 U.S.C. §2101(b) (1976).

The general rule is that a judgment is not final, for the purposes of computing the time for taking of an appeal, until a motion for a new trial, if entertained by the court, has been disposed of. *United States v. Ellicott*, 223 U.S. 524 (1912); *United States v. Seminole Nation*, 299 U.S. 417 (1937) and cases cited therein. This is because the judgment originally rendered is still under the control of the trial court and therefore cannot be deemed a final disposition of the cause until and unless a new trial has been denied. *Kingman v. Western Mfg. Co.*, 170 U.S. 675 (1898); *Brockett v. Brockett*, 43 U.S. (2 How.) 238 (1844). This rule has been applied whether the post-judgment motion was a petition for a rehearing, a motion for reconsideration or a motion for a new trial. *See United States v. Dieter*, 429 U.S. 6 (1976); *Communist Party of Indiana v. Whitcomb*, 414 U.S. 441 (1974); *United States v. Healy*, 376 U.S. 75 (1964); *United States v. Ellicott, supra; United States v. Seminole Nation, supra.*

Although this is a direct appeal under 28 U.S.C. §1253 (1976), the policy and practice applied by the courts of appeals are illustrative of the principle the State urges this Court here to apply. For example, in *Richerson v. Jones*,

[39]A.135-136.

572 F.2d 89 (3d Cir. 1978), the court applied this rule and took jurisdiction of an appeal filed within 60 days of the district court's decision denying the appellant's motion for a new trial but more than 60 days after the initial judgment and decree. The court stated:

> "The wisdom of this rule is clear. If the rule were otherwise, the 60-day period for appeal would often pass while the district court was assessing the Rule 59 motion and thus the moving party would lose his right of appeal." 572 F.2d at 93, n. 4.

Accord, Pierre v. Jordan, 333 F.2d 951 (9th Cir. 1964), *cert. denied*, 379 U.S. 974 (1965).

Moreover the alternative in a case such as this (motion for *partial* new trial) would be to hold that a portion of a judgment is final for purposes of appeal while another portion of the same judgment is not final for that purpose until disposition of the post-trial motion by the court. Such a view would contravene sound policy, however, because it would encourage, if not require, piecemeal appeals of a single action resulting in confusion, delay, expense to the parties and the courts, and a wasteful expenditure of judicial resources. Thus, the fact that the State filed a motion for a partial new trial is insufficient reason to disregard the general rule regarding nonfinality of judgments pending disposition of Rule 59 motions. As authorized by FED.R.CIV.P. 59(a), a new trial may be granted "on all or *part* of the issues." (Emphasis supplied). And, where a partial new trial has been granted, it has been held that those portions of a judgment not subject to the motion for new trial and not retried do not thereby become a final judgment. Rather they are merged into and become a part of the judgment entered following retrial. *Weymouth v. Colorado Interstate Gas Co.*, 34 F.R.D. 4 (N.D.Tex. 1963), *aff'd*, 367 F.2d 84 (5th Cir. 1965). As the court stated in *Weymouth*,

> "[i]t was necessary that the portions of the verdict and judgment as to the other issues stand until the determination of the [issues subjected to a new trial]; but in such form the judgment was not a final one.

> * * * The portions of the first judgment not set aside as mentioned above are merged into and become a part of the judgment entered following the last jury verdict. * * * the one and only final judgment * * * ." 34 F.R.D. at 6.

Accord, C. Wright & A. Miller, FEDERAL PRACTICE AND PROCEDURE, §2814 (1973).

In the instant case, the State sought by its Rule 59 motion to obtain a new trial limited to the cigarette and sales tax issues but the entire judgment of the three-judge district court was still under its control. Until disposition of the State's motion, the trial court retained the power to amend, modify or vacate its judgment and, of course, the court retained the power to alter its judgment as a result of any new trial. Therefore, sound policy suggests that this Court should hold the State's timely motion for a partial new trial, pursuant to FED.R.CIV.P. 59(a), to have suspended the finality of the three-judge district court's judgment for purposes of appeal until the date of the entry of the court's denial of that motion. Further, the Court should hold that those portions of the judgment not subject to the State's new trial motion became merged into and a part of the one final judgment which resulted from the district court's decision to deny the State's motion for a new trial.

The conclusion follows that the State filed a timely notice of appeal from the denial of that motion which, as timely amended, raised all issues decided adversely to the State by the district court. This Court therefore has jurisdiction of both the cigarette and sales tax issues and the motor vehicle excise tax issues in No. 3868 under Sup. Ct. R. 11(3).

III. A STATE MAY IMPOSE UPON AN INDIAN TRIBE AND/OR ITS LICENSED INDIAN RETAILERS THE OBLIGATION TO COLLECT STATE EXCISE TAXES ON SALES OF CIGARETTES TO NON-INDIANS WHERE THE LEGAL INCIDENCE OF THE TAX FALLS ON THE NON-INDIAN, DESPITE THE

FACT THAT THE TRIBE HAS ADOPTED ORDINANCES TAXING THESE SAME TRANSACTIONS.

A. **INTRODUCTION.**

This issue is common to both the *Colville* and *Yakima* cases. It is the most crucial issue in this case because it involves the power of the State to tax non-Indians and the power of the Tribes to preempt that state power.

Only three years ago, in *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976), this Court unanimously held that the State of Montana could require tribally-licensed Indian cigarette retailers to collect and remit a state excise tax imposed on non-Indian purchasers of such cigarettes. The Court found that requiring collection by Indians of this "concededly lawful tax" upon non-Indians (425 U.S. at 483) neither frustrated tribal self-government nor ran "afoul of any congressional enactment dealing with the affairs of reservation Indians" (425 U.S. at 483).

The district court nevertheless held that a state could not even impose its cigarette tax on non-Indian purchasers, and *a fortiori* could not require Indians to collect that tax where the Tribe imposed its own tax on these same transactions. In the district court's view, the state tax on non-Indians was "preempted" by the Tribe's tax and interfered with the right of tribal self-government.

This issue, therefore, involves the question of whether *Moe* will continue to have any vitality. If the State can impose its cigarette taxes on non-Indian purchasers, it can require tribally-licensed retailers to collect that tax and remit it to the State. No one seriously contends otherwise. On the other hand, if the State cannot impose its tax on such non-Indian purchasers, it admittedly cannot require Indians to collect that tax. But in that event *Moe* would be meaningless.

In this section of the brief, we will show that Washington's cigarette and sales taxes are as "lawful" as Montana's cigarette tax, as applied to cigarettes purchased by non-Indians from reservation Indians. The State will

also demonstrate that Washington's taxes are indistinguishable in operation and effect from Montana's tax, and that the factors which motivated this Court to uphold the Montana tax collection requirement as applied to Indian sellers are equally applicable here.[40] Before so doing, however, we first describe in some detail the basis for the district court's holding. That holding, of course, not only struck down the collection requirement, but struck down as well any imposition of the state tax upon the non-Indian customers.

The district court adopted two alternative theories in support of that holding, a federal preemption theory and a theory based upon the concept of tribal self-government. Under the preemption theory, the court first found that the Tribes were exercising federally delegated power to tax non-Indians. The court found this delegation in section 16 of the Indian Reorganization Act of 1934, 25 U.S.C. §476 (1976), which delegates to Indian tribes those "powers vested in any Indian tribe or tribal council by existing law." According to the court, the power to tax non-Indians as well as Indians was a power vested in an Indian tribe by existing law, citing *Iron Crow v. Oglala Sioux Tribe*, 231 F.2d 89 (8th Cir. 1956). The court reasoned that since the

[40]It would perhaps be helpful to an understanding of the State's position to set forth what the State is *not* contending. First, the State is not contending that it can impose its excise taxes upon reservation Indians with respect to activities taking place solely within reservation boundaries. *See McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973). Second, the State is not contending that the status of land, *i.e.* whether held in fee or in trust or restricted status, makes any difference as to the tax liability of Indian retailers. *See Moe, supra*, and *Bryan v. Itasca County*, 426 U.S. 373 (1976). Third, the State is not contending that congressional consent to the state assumption of civil and criminal jurisdiction over Indian reservations pursuant to Public Law 83-280 includes the assumption of state taxing jurisdiction over Indian tribes and Indians residing on the reservation. *See Bryan, supra*. Finally, the State does not contend that it can impose its tobacco products (cigars and pipe tobacco) tax, chapter 82.26 RCW, on reservation Indian retailers. As noted by the district court (J.S. App. 23, n. 15), the legal incidence of the tobacco products tax falls upon the reservation retailer. The State does not dispute this finding, and it is not within the issues raised on appeal.

tribal taxing scheme regulated the same subject matter as the State's taxing scheme, the State's scheme must give way (J.S. App. 32-35). The court did not discuss at all the impact of *Moe, supra,* on this line of reasoning.

Under its second and alternative theory, the court held that the State's cigarette taxing scheme constituted an impermissible interference with tribal self-government. After noting that "* * * both the State and the Tribes seek to tax non-Indians as a result of their on-reservation transactions with Dealers * * * ." (J.S. App. 37), the court found that the economic effect of the combined state and tribal cigarette taxes, which we have described at pp. 19-21, *supra*, would result in depleting the Tribes' tax base and possible elimination of essential revenues needed for tribally-sponsored programs. In the court's view, the Tribes had thus demonstrated, through this economic effect, an "actual interference" with tribal self-government (J.S. App. 39).

This economic effect played a crucial role in the court's reasoning, under both its preemption theory and its tribal sovereignty theory. This is shown by the court's repeated references to that effect.

Thus, in its discussion of the facts, and before discussing either legal theory in *Colville,* the court stated:

> "Due to the competitive advantage enjoyed by the Tribes over retailers who do impose the State's tax, nearly 90 percent of the Tribes' sales are made to non-Indians. The State tacitly concedes the Tribes' source of cigarette tax revenue would dry up if they were forced to add the State tax to the cost of their cigarettes. The facts dictate that the tribal taxes could not be a continuing source of income if tribal cigarette sales to non-Indians are also subject to State's cigarette tax; tribal cigarette sales to non-Indians would be eliminated and the cigarette sales commerce between the Tribes and non-Indians would be destroyed. Thus, each Tribe's ability to fund its sponsored programs would suffer substantial interference." (J.S. App. 7-8).

In discussing the preemption theory, the district court returned again to this economic effect:

> "The bulk of the revenue derived from the tribal taxes comes from sales to non-Indians. The impact of imposing the State's cigarette tax in addition to the tribal tax will not only eliminate the Tribes' competitive advantage but it will give off-reservation retailers a substantial price advantage. Thus, it is not hard to understand why the State conceded that:
>
> > " 'Assuming that the court finds that the State could require the Tribe and/or its licensed retailers to add the State tax to the sale price of cigarettes sold to non-Indians, *it is painfully apparent that very few, if any, cartons of cigarettes would have been sold.*' (Emphasis added.)
>
> "Under such circumstances, the objectives of Congress in making the delegation of power and of the Tribes in passing the taxation ordinances for tribal usage would obviously be frustrated. Therefore, the application of the State's tax has been preempted." (J.S. App. 35).

And again, in discussing the tribal self-government theory, the court stated:

> "In this case, both the State and the Tribes seek to tax non-Indians as a result of their on-reservation transactions with Dealers. The impact of superimposing the State's cigarette tax on the tribal taxes has already been discussed in this opinion. However, it bears repeating that at least with regard to a commodity as highly price elastic as cigarettes, the result will be the depletion of an already limited tribal tax base, probably destruction of the tribal enterprises and elimination of essential revenues needed for tribally sponsored programs." (J.S. App. 37).

In *Yakima,* the court emphasized once again the impact on the smoke shops stemming from imposition of the state tax upon the non-Indians.

> "As in No. 3868, the competitive advantage enjoyed by the Tribe due to its refusal to impose the State's cigarette tax has resulted in the majority of tribal

cigarette sales being made to nonmembers of the Tribe. The stipulations of fact and testimony of Cyril Herrmann establish that superimposing the State's cigarette tax of $1.60 per carton upon tribal sales would have the same impact as it would in No. 3868. That is, the tribal cigarette enterprise would be destroyed, thus eliminating a source of tax revenue upon which the Yakima Tribal Council relies for a substantial amount of its operating capital." (J.S. App. 49-50).

The district court's reasoning, in short, was essentially as follows: In order to keep their non-Indian customers, the Indian smoke shops require, as a practical economic matter, the competitive advantage which stems from the immunity of those customers from state taxation. Without that competitive advantage, the non-Indians will buy their cigarettes elsewhere. And the Tribes, in turn, require a brisk trade between the smoke shops and their non-Indian customers in order to derive their tax revenue from that trade for funding tribal programs.

Thus, under both the "preemption" and "tribal self-government" theories as articulated by the district court, Indian tribes are conferred the right to bestow upon, and market to, non-Indians an immunity from state law in order to raise revenues for tribal programs.[41]

Three consequences or corollaries which follow from the district court's reasoning should here be noted. First, under that reasoning, the question of who collects the tax from the non-Indians is really irrelevant. It makes no difference whether the tax is collected by the State directly, or by the Indian retailers, who then remit it to the State, as in *Moe*. For the very imposition of the tax, regardless of who collects it, would drive off the

[41]The majority distinguished *Moe* on the grounds that in *Moe* there was no tribal tax and the tribe itself supposedly received no direct benefits from the cigarette sales (J.S. App. 39).

Judge Kilkenny, in dissent, found that *Moe* was indistinguishable. He noted that the only difference was the tribes' decision to levy a tax on the sale of cigarettes. In his view, "[t]he mere imposition of a tribal tax [did] not rise to the level of a preemption of the taxing field on that article." (J.S. App. 63).

non-Indian customers. And thus the district court enjoined the imposition of the tax, and not just the collection requirement. This result followed inexorably from the district court's reasoning. Simply enjoining the requirement of Indian collection would not be sufficient; for the State could still dry up the non-Indian market through direct collection.

Secondly, under the district court's reasoning it would appear that the tribal right which the district court found would be violated by the State if the State were to *repeal* its cigarette tax completely, for all Indians and non-Indians alike. Though this statement may sound startling, it only shows the startling nature of the tribal right, as found by the district court. For the effect of such a repeal would clearly be to eliminate the competitive advantage enjoyed by the smoke shops, and to eliminate thereby the non-Indian market and the tribal tax base attributable to that market. If, as the district court found, the Tribes have a right to that tax base — and therefore a right to that market — elimination of that market by a complete repeal of the cigarette tax would, quite logically, constitute a violation of that right.

Thirdly, under the district court's reasoning, it makes no difference whether the legal incidence of the *tribal* tax is upon the non-Indians themselves — as in *Colville* — or whether it is upon the Indian retailers — as in *Yakima*. For if the non-Indian customers are taxed by the State, the tribal cigarette tax will lose most of its tax base, i.e., the portion attributable to business with non-Indians, in *either* event. The economic effect will be the same, regardless of the precise legal incidence of the tribal tax.[42]

[42]The opinion of the district court can be somewhat confusing on this point. In its opinion in *Colville*, the court seems to stress the fact that the Tribal taxes are imposed upon the non-Indian purchasers, under the apparent assumption that this fact has some legal significance. For example, the court states: "In this case [*Colville*] both the State and the Tribes seek to tax non-Indians as a result of their on-reservation transactions with Dealers." (J.S. App. 37) But under the court's reasoning, as outlined above, this fact actually has no such legal significance. And the court seems to recognize this, at least implicitly,

Because of this third consequence or corollary, we discuss the *Yakima* case first, thus reversing the order followed by the district court. If the Tribal tax in *Yakima*, which is imposed upon the Indian retailers, does not oust the State of power to impose its own tax upon the non-Indians, and of its power to require the retailers to collect that tax, the Tribal taxes in *Colville* certainly do not either, even though they are imposed directly upon the non-Indians. If the district court's reasoning is invalid as applied to the Tribal tax in *Yakima*, it is invalid as applied to the Tribal taxes in *Colville* as well.[43]

Similarly, we discuss the issue of interference with tribal self-government first, thus reversing again the order followed by the district court. This is because federal

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by applying that same reasoning and reading the same result in *Yakima*, where, of course, the legal incidence of the Tribal tax is clearly upon the Indian seller.

Perhaps the court felt more comfortable, in adopting its two theories, in stressing the fact that the Tribal taxes in *Colville* were imposed upon the non-Indian purchasers. For both theories are based upon some sort of conflict between the Tribal and state taxes; and if the legal incidence of the two taxes is the same, the conflict appears more acute. But if the court's theories are actually premised upon the fact that the legal incidence of the Tribal tax is upon the non-Indians, two consequences would follow: in *Yakima*, those theories would have no applicability at all; and in *Colville* it would be necessary to resolve the question of the validity of the Tribal tax in the first instance, before even the reaching the question of the validity of these theories.

[43]The Tribal taxes in *Colville* present, however, an issue not present in *Yakima*. Because they are imposed upon non-Indians, they are not, in our view, even valid in the first instance. For Indian tribes have no power to impose taxes upon non-Indians, under the rationale of this Court's decision in *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978). Thus, we do not contest the validity of the Tribal tax in *Yakima*; but we contest most vigorously the validity of the Tribal taxes in *Colville*. And if these taxes are invalid, one need not reach the question of the validity of the district court's reasoning; a Tribal tax which is itself invalid certainly cannot oust a state tax under any theory. But likewise, if the district court's reasoning is invalid, as applied in both *Yakima* and *Colville*, one need not reach the question of the validity of the tribal taxes in *Colville*. And it is to this reasoning that our principal argument is here addressed.

preemption under §16 of the Indian Reorganization Act of 1934, 25 U.S.C. §476 (1976), ultimately depends upon a finding of interference with tribal self-government. The purpose of the IRA was to revitalize tribal self-government. *Fisher v. District Court*, 424 U.S. 382, 387 (1976). If the state's tax does not conflict or interfere with that purpose, it is not federally preempted. *Cf. Hines v. Davidowitz*, 312 U.S. 52 (1941).

However, before responding directly to the issues raised by the district court's analysis, we begin by setting forth the legal basis of the power of the state to tax its non-Indian citizens engaged in economic transactions on Indian reservations.

B. A State May Impose An Excise Tax On Its Non-Indian Citizens With Respect To Purchases Made From A Tribe Or Its Licensed Retailers So Long As The State's Tax Does Not Discriminate Against Such Non-Indian Purchasers.

The states have historically been permitted to tax non-Indians owning property on Indian reservations or engaged in economic transactions with reservation Indians. *Utah & Northern Ry. v. Fisher*, 116 U.S. 28 (1885); *Thomas v. Gay*, 169 U.S. 264 (1898); *Moe, supra*. And for purposes of this argument, the State does not dispute the right of the Tribes to tax the sale of cigarettes to non-Indians by the licensed retailers of the Tribes within the limits of the Tribes' reservations.[44]

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[44]Alternatively, the State will argue that the Tribes have no authority to tax non-Indians, either as a matter of exercising federally delegated authority, pp. 81-84, *infra*, or by reason of "inherent tribal sovereignty", pp. 75-78, *infra*. If the Tribes have no power to tax non-Indian purchasers, by definition there can then be no "tribal preemption" or "interference with tribal self-government". However, if the State is correct in arguing that tribal taxes do not preempt state taxes, there is no need to reach the question of tribal taxing power over non-Indians.

Even assuming, arguendo, that the Tribes have the power to tax non-Indian purchasers, what we have then is a classic situation of two jurisdictions — each having taxing power — exerting that power against the same individual or transaction.

In these times, it cannot seriously be contended that the exercise of taxing power by one government *ipso facto* excludes the exercise of taxing power by another government exercising territorial jurisdiction over the person or transaction sought to be taxed. The taxing power is a fundamental attribute of sovereignty, capable of being exercised to the fullest extent throughout the territory of the sovereign — and denied only for the weightiest concerns. Thus, a state is not precluded from taxing the income of its citizens just because the United States also imposes a tax on the income of such citizens. *Graves v. New York*, 306 U.S. 466 (1939). Indeed, a state may tax the income of its residents earned in another state without providing for a credit for income taxes paid to the state in which the income was earned. *See Maine v. New Hampshire*, 426 U.S. 660, 664 (1976); *see also, Guaranty Trust Co. v. Virginia*, 305 U.S. 19 (1938).

Perhaps more directly in point, a state may impose an excise tax on its own citizens with respect to in-state use or consumption of an article purchased in another state. *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937). This power to tax is not affected by the exercise of taxing power by the state in which the article is purchased. *Henneford, supra*. For example, Washington may tax its citizens with respect to in-state use or consumption of cigarettes purchased in Oregon.[45] Taxing such cigarettes when consumed in Washington may discourage Washington citizens from purchasing cigarettes in Oregon, and hence reduce the tax base of Oregon, but that does not infringe upon the sovereign right of Oregon to tax purchases of cigarettes made in that state.

[45]In fact, Washington does tax its citizens who purchase cigarettes in Oregon for consumption in Washington, and does not give its citizens a credit or offset for taxes paid to Oregon. *See* RCW 82.24.020, Br. App. 22a.

Insofar as Washington's citizens are concerned, they will suffer "double taxation" on cigarettes purchased in another state. But the federal constitution "* * * no more prohibits double taxation than it does doubling the amount of a tax * * * ." *Fort Smith Lumber Co. v. Arkansas*, 251 U.S. 533 (1920) (Holmes, J.). So long as Washington's tax is not discriminatory, *i.e.*, so long as it is imposed at the same rate on all cigarettes consumed in the state — without regard to state of purchase — the tax will be permitted to stand.[46] *Henneford v. Silas Mason Co., supra*.

The point to be made here is simply stated. Where two entities have territorial jurisdiction to tax a person or transaction, both may exercise that power independently of the other, so long as neither discriminates against the citizens of the other.

To be sure, the economic effect of a state imposing a cigarette tax on a resident with respect to cigarettes purchased outside the state may very well reduce the tax revenues of a sister state by discouraging purchases of cigarettes in the sister state. However, so long as a state's tax treatment of its residents and nonresidents is equivalent, *i.e.*, nondiscriminatory, (*cf. Austin v. New Hampshire*, 420 U.S. 656 (1975)) there is no constitutional prohibition.[47] The result will necessarily be "double taxation" in the sense that each entity retains the power to impose its tax independent of the other. But this result

[46]The Due Process Clause and limits on Washington's territorial jurisdiction would prevent Washington from requiring Oregon retailers to collect Washington's tax on cigarettes. But that is not a barrier to imposing collection responsibility on Indian retailers where Indian reservations are located within Washington. *Moe, supra*.

[47]Here, there is no claim that Washington's cigarette and sales taxes, as applied to non-Indians purchasing cigarettes from reservation retailers, are discriminatory. Nor could there be. The taxes are the same, whether the non-Indian purchases cigarettes from an Indian retailer or a non-Indian retailer. Thus, to the extent that both the State and the Tribes seek to impose a tax upon non-Indians purchasing from tribal retailers, both jurisdictions may constitutionally impose such a tax.

poses no constitutional problems. *Maine v. New Hampshire, supra*; *Graves v. New York, supra.*

Lower federal courts which have considered this problem (with the exception of the court appealed from in this case) have recognized the foregoing analysis. For example, in *Fort Mojave Tribe v. County of San Bernardino,* 543 F.2d 1253 (9th Cir. 1976), *cert. denied,* 430 U.S. 983 (1977), both the tribe and a county sought to impose a possessory interest tax on non-Indian lessees leasing land from the tribe. The Court, in response to a contention that the state's possessory interest tax impaired the ability of the tribe to levy its tax stated:

> "There is no improper double taxation here at all, for the taxes are being imposed by two different and distinct taxing authorities. The tribe faces the same problem as other taxing agencies confront when they seek to impose a tax in an area already taxed by another entity having taxing power." 543 F.2d at 1258.

Accord, Mescalero Apache Tribe v. O'Cheskey, 439 F.Supp. 1063 (D. N.Mex. 1977). *See also, Aqua Caliente Band of Mission Indians v. County of Riverside,* 442 F.2d 1184 (9th Cir. 1971), *cert. denied,* 405 U.S. 933 (1972); *The Ute Indian Tribe v. State Tax Commission,* 574 F.2d 1007 (10th Cir. 1978), *cert. denied,* 99 S.Ct. 452 (1978).

In sum, the legal basis for the State's claim that it may impose its tax on non-Indians purchasing cigarettes from tribal retailers is nothing more than the simple exercise of the state's sovereign power to tax its own citizens with respect to economic transactions carried on within the state's borders. The fact that the economic transaction in question—the purchase and consumption of cigarettes—occurs on an Indian reservation presents no barrier to the exercise of the state's power. *Thomas v. Gay,* 169 U.S. 264 (1898). The fact that an Indian tribe taxes the same transaction—directly or indirectly—similarly presents no barrier to the exercise of the state's power. *See Graves v. New York,* 306 U.S. 466 (1939); *Fort Mojave Tribe v. County of San Bernardino,* 543 F.2d 1253 (9th Cir. 1976).

The district court majority nevertheless would deny the State this sovereign power over its own non-Indian citizens. The court perceived a conflict between state and tribal taxing power as applied to non-Indians purchasing cigarettes from reservation-based Indian retailers, and resolved this conflict in favor of tribal taxing power.

In the remaining portions of its argument on this issue, the State will show that in reality no such conflict exists and that, even assuming a conflict, its resolution does not require stripping the state of its historically exercised sovereign power over its non-Indian citizens. This was the approach adopted by this Court in *Moe;* and it should be the approach adopted in this appeal.

C. A State Tax Imposed on Non-Indians Purchasing Cigarettes From Tribally-Licensed Reservation Retailers Does Not Infringe on the Right of "Tribal Self-Government", Even Where the Tribe Imposes a Tax on the Same Transaction.

1. The Right of Tribal Self-government Includes Only the Right of the Tribe to Pass and Enforce Laws Governing the Affairs of Tribal Members; It Does not Include the Right to Market a Tax Exemption to Non-Indians.

The Yakima Tribe's cigarette tax ordinance imposes a "permit fee" of 22.5¢ per carton of cigarettes sold or distributed to the Tribe's licensed retailers. *See* §4, Tribal Ordinance, A.209. Because the tax is not required to be passed on to the ultimate consumer, its legal incidence falls upon the tribal retailer. *See United States v. Mississippi Tax Comm'n,* 421 U.S. 599 (1975).

Thus, in the *Yakima* case, the Tribe is taxing its own members with respect to sales of cigarettes. The tribal tax does not reach non-Indians and, as we understand it, there is no claim by the Tribe that it does so.

In these circumstances, was the district court correct

in holding that the imposition of the State's tax on non-Indians purchasing cigarettes from the Yakima Tribe's licensed retailers constituted an unreasonable interference with tribal self-government?

Essentially, the district court held that the "right of tribal self-government" includes the right to market a tax exemption to non-Indians in order to raise revenues for tribal programs benefiting members of the tribe. The issue, therefore, is whether the right of tribal self-government includes such a power and, if so, whether state taxation of such non-Indian purchasers impermissibly interferes with that right. It is the State's position that the right of tribal self-government extends only to the right to control the internal relations between the tribe and its members and, furthermore, that a state tax imposed on non-Indians does not interfere with such rights.

First, the right of tribal self-government extends only to the right to control the internal relations of the tribe by prescribing laws applicable to tribal members and enforcing those laws in its own courts. A tribe has the power to determine tribal membership, *Red Bird v. United States*, 203 U.S. 76 (1906) ("Cherokee Intermarriage Cases"); to prescribe rules for the inheritance of property, *Jones v. Meehan*, 175 U.S. 1 (1899); and to regulate domestic relations among tribal members, *Fisher v. District Court*, 424 U.S. 382 (1976); and "* * * the right to prescribe laws applicable to tribal members and to enforce those laws by criminal sanctions." *United States v. Wheeler*, 435 U.S. 313, 322 (1978).

The "right of tribal self-government" reached perhaps its fullest expansion in *Williams v. Lee*, 358 U.S. 217 (1959). *Williams* involved the power of a state court to resolve a dispute between an Indian purchaser and a non-Indian seller arising out of a transaction occurring on the Navajo Indian Reservation. The Court held that to subject the Indian purchaser to state court jurisdiction would infringe upon the tribal right of self-government.

The Court characterized the right of tribal self-government to be "* * * the right of reservation Indians to make their own laws and be ruled by them." 358 U.S. at 220.

Noting that the Navajo tribal court had jurisdiction to resolve civil disputes between Navajos and non-Indians, the Court stated:

> "There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves. It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there." 358 U.S. at 223.

In each of these cases, the central concern of the Court has been to protect the right of the Tribe to pass and enforce laws governing the affairs of *its members* on the reservation.

This concern has been manifested by forbidding a state to apply its laws, enforced in its courts, *to reservation Indians*, in situations where the Tribe could fairly claim an interest in having tribal law apply, *e.g., Fisher v. District Court, supra*. And in situations where both the tribe and the state could fairly claim an interest in having their respective laws apply *to reservation Indians*, the preference has been for tribal law. *Williams v. Lee, supra*. Even though this preference would result in tribal law being made applicable to non-Indians, it nevertheless is merely an adjunct to the exercise of a tribe's jurisdiction over its own members and clearly results from the central concern of shielding reservation Indians from state law.

The situation presented by this case is, however, fundamentally different. The State is seeking to apply its tax to *non-Indians;* not to reservation Indians. There is no conflict as to which set of laws will apply to reservation Indians—clearly it will be tribal law. Tribal members cannot possibly be subjected to state taxation.[48] Thus,

Williams v. Lee is inapplicable to the situation presented in this case because it is completely unrelated to the conflicts between tribal and state jurisdiction *over reservation Indians* which the *Williams* "infringement test" was designed to resolve.

Extending the "right of tribal self-government", as articulated in *Williams v. Lee*, to a tribal right to market an exemption from state law to non-Indians in order to derive revenues for tribal programs is wholly unwarranted. There is no doubt that Indian tribes have the right to tax their own members in order to raise revenues, but that right does not extend to shielding non-Indians from state law—whatever the salutary economic benefit to the Tribe. Indian Tribes simply have no legitimate governmental interest in providing a "tax haven" for the benefit of non-Indians.[49]

Thus, the district court made its first analytical error in assuming that the "right of tribal self-government" as articulated in *Williams v. Lee, supra*, included the right to market a tax exemption to non-Indians for purposes of raising tribal revenue for expenditure on tribal programs.

2. **The Tribe Has Failed to Demonstrate that**

[48]Arguably, the refusal of the Tribe or its members to collect the State's tax imposed upon non-Indian purchasers with respect to reservation sales would subject tribal members to state law. However, this does not infringe upon the right of tribal self-government. *Moe, supra.*

[49]As stated by Congressman Lloyd Meeds in his dissent to the Final Report of the American Indian Policy Review Commission:

> "* * * immunity-motivated conduct of non-Indians should *not* be immune from State law. Where transactions take place or take a particular form precisely because of hoped-for immunity to non-Indians, no tribal interest is truly implicated other than possible tribal desires to 'franchise' their immunities to non-Indians. But such 'interests' are not legitimate. Otherwise it would be possible for Indians to 'market' immunity from State law by inducing essentially non-Indian activities to relocate on the reservation and by coloring them with a mere form of Indian involvement." 1 Final Report of the American Indian Policy Review Commission, at 592 (1977) (Emphasis in original).

Elimination of Cigarette Sales to Non-Indians as a Source of Tribal Revenues will Threaten the Self-governing Ability of the Tribe.

Additionally, the court erred in finding an actual interference with tribal self-government. This error resulted not only from the court's misconception of the right of tribal self-government, but also from a misconception of the arguments and proof advanced by the parties.

To begin with, it is important to understand what is *not* in dispute is the *economic effect* of the imposition of both a state and a tribal tax upon the sale of cigarettes by a tribal retailer to a non-Indian. The Tribe's experts testified that the results of this "double taxation" would be to discourage, if not entirely eliminate the business of retailing cigarettes to non-Indians.[50] The State does not dispute this economic effect. Furthermore, the State does not dispute the fact that the inability of the Tribe to market a tax exemption will have a negative impact upon Tribal revenues available for expenditure on Tribal programs.

What the State is disputing, however, is the extent of this negative impact on the self-governing ability of the Tribe. No credible testimony exists on what the effect of this inability to market a tax exemption will have on the self-governing ability of the Tribe. No one claims that the Tribe will be unable to govern their members if they cannot raise revenues by selling cigarettes to non-Indians. The district court found that loss of this revenue source would result in depletion of the tribal tax base, destruction of the tribal cigarette enterprises, and elimination of essential revenues needed for tribally sponsored programs. (J.S. App. 37)

Each of these factual conclusions, however, ultimately begs the question of interference with the right of reservation Indians to make their own laws and be governed by them. *Williams v. Lee*, 358 U.S. 217 (1959).

[50]*See* Affidavit of Ronald L. Trosper (*Colville* case), A.125-129; Deposition of Cyril Herrmann (*Yakima* case), pp. 45-47, A.249-250.

The nature and extent of the Tribes' tax base, to the extent it includes sales to non-Indians, has nothing to do with the relation between the Tribe and its members. Similarly, the establishment of tribal enterprises designed primarily to cater to non-Indians has nothing to do with the relation between the Tribe and its members.

The reduction in revenues spent upon tribally-sponsored programs is an undeniable fact, but the *effect* upon these tribally-sponsored programs is uncertain, at best, and purely speculative in terms of its effect upon the self-governing ability of the Tribe. For example, during fiscal year 1976 (1975-1976) the Yakima Tribal Council supervised the expenditure of $11,992,039 in tribal funds for governmental and tribal programs (*Yakima*, Pre-trial Order, ¶5.12(2), A.178). During calendar year 1975, the total revenue to the Tribe from its tax and wholesaling enterprise was $270,408.24 (*Yakima*, Pre-trial Order, ¶5.11, A.177). Thus, only a little more than two percent of the Yakima Tribe's revenues expended on governmental and tribal programs were derived from its cigarette tax. Certainly, elimination of this revenue source could well reduce the amount of revenues that the Tribe could spend elsewhere, but it can hardly be said to *actually* threaten the self-governing ability of the Tribe.[51]

In short, imposition of the State's tax upon non-Indian purchasers, whatever the economic effects, has no demonstrable effect upon "tribal self-government". The Tribe is free to tax or not tax its own members as it sees fit; not a single tribal member is subject to the state tax. The effect upon the Tribe is far too remote and indirect to constitute an "actual interference" with tribal self-government. Certainly, the failure of the Tribe to demonstrate any such interference is grounds for rejection of their claim.

This is the view shared by other lower courts who

[51]In this connection, it should be noted that each Tribe in the *Colville* case has utterly failed to produce any evidence of inability to tax members or seek alternative sources of revenue.

have considered similar claims. In *Mescalero Apache Tribe v. O'Cheskey*, 439 F.Supp. 1063 (D. N.Mex. 1977), in response to the Tribe's argument that New Mexico's gross receipts tax imposed upon a contractor constructing a resort on the Tribe's reservation infringed on tribal self-government, the court stated:

> "There is no question that the imposition of the tax will have an economic effect upon the Tribe. Such taxes normally are 'passed on' to the purchaser. * * * The effect is to reduce monies the Tribe could spend well on other things, but this does not make the tax anything more than an indirect burden on the Tribe. *Thomas v. Gay*, * * * 169 U.S. 264 (1898) * * *; *see Aqua Caliente Band of Mission Indians v. County of Riverside*, 442 F.2d 1184 (9th Cir. 1971), *cert. denied* 405 U.S. 933 (1972). It does not rise to the level of state infringement on the right of reservation Indians to make their own laws and be ruled by them. *See Williams v. Lee*, 358 U.S. 217 * * * (1959).
>
> "Nor does the enactment of gross receipts tax and licensing ordinances by the tribal council make improper the imposition upon the contractors of the state's gross receipts tax. It does not interfere with tribal self-government simply because the tribe and another entity may have the power to impose a tax in the same area. *Fort Mojave Tribe v. County of San Bernardino*, 543 F.2d 1253 (9th Cir. 1976), *cert. denied* 430 U.S. 938 * * * (1977). While it may be true that the Tribe has the power to grant the privilege of engaging in business on the reservation, it is also true that the state has the power to tax business conducted in the state. The Mescalero Reservation is not located by itself on another planet. It is situated in New Mexico, and at the very least, the contractors were accorded benefits by and protection from the state as they went to and from the reservation." 439 F.Supp. at 1073 (citations omitted).

In sum, state taxation of non-Indians purchasing cigarettes from tribally-licensed retailers does not interfere with tribal self-government, even where the Tribe imposes a tax on the same transaction. The right of tribal self-government goes only to the right of the Tribe and its

members to make their own laws and be governed by them. Nothing in the state's tax scheme subjects tribal members to state law.[52] The mere fact that the Tribes will probably have to search elsewhere for an equally lucrative revenue source to enhance tribal programs is not grounds for vitiating the state's tax as applied to non-Indians. Indian tribes, in the exercise of their powers of self-government, simply have no recognized right to market a tax exemption to a state's non-Indian citizens.

3. **A State Tax on Non-Indians Purchasing Cigarettes from Tribal Retailers does not Interfere with Tribal Self-government, Even Where the Tribe Taxes the Same Non-Indian Purchaser.**

Unlike the tribal tax involved in the *Yakima* case, the legal incidence of the tribal taxes in the *Colville* case fall directly upon the non-Indian purchaser. For example, §8 of the Colville Tribe's tax ordinance, A.104 provides:

> "There is being levied and there shall be collected as hereinafter provided, a tax upon the sale, use, consumption, handling, possession or distribution of all cigarettes in the amount of three cents per package. The Council may levy an additional tax upon the distribution of cigarettes and other tobacco products as it deems desirable. The excise tax levied hereunder shall be a tax upon distribution of cigarettes and other tobacco products by the Tribes only and shall not constitute an assessment or license fee upon enrolled members of the Tribes doing business within the reservation or obtaining special rights or privileges.[53]
>
> "The excise tax levied hereunder shall be first a tax upon distribution of cigarettes and other tobacco products by the Tribes pursuant to Section 10 of this ordinance; provided, however, that failure to pay the tax at the time of such distribution shall not prevent

[52] *See* n. 48, *supra*, p. 68.

[53] The Lummi and Makah Ordinances are similar. *See* A.114 (Makah); A.121 (Lummi).

> tax liability from arising by reason of another taxable event. The excise tax levied hereunder shall be added to the retail price of tobacco products sold to the ultimate consumer."[54]

The answer to this question is the same as in the *Yakima* case. The Tribes have no recognized tribal right of self-government to market an immunity from state tax laws to non-Indians in order to raise revenue for tribally-sponsored programs. The fact that the Tribes in the *Colville* case seek to directly tax non-Indian purchasers for this purpose does not convert the tax into an accoutrement of tribal self-government. Surely, if the Yakima Tribe has no right to market a tax immunity to non-Indians by taxing its own members, the Tribes in the *Colville* case have no right to market such a tax immunity by taxing non-Indians.

Furthermore, the record in the *Colville* case is devoid of any evidence relating to the impact of the Tribes' inability to market a tax exemption upon the self-governing ability of the Tribe. There is no evidence as to the percentage of cigarette tax revenues expended on tribal programs. There is no evidence as to which — if any — tribal programs will be curtailed as a result of the loss of cigarette tax revenues derived from sales to non-Indians.[54]

For these reasons, a state tax on non-Indians purchasing cigarettes from tribal retailers does not interfere with tribal self-government, even where the Tribe taxes the same non-Indian purchasers.

4. **The Power of the State to Tax Non-Indians Purchasing Cigarettes from Tribal Retailers has not Been Preempted by Tribal Ordinances Taxing the Same Transactions.**

[54] The testimony of the Tribe's economic expert was limited to the economic effect of superimposing the State's tax upon the tribal tax. *See* Affidavit of Ronald L. Trosper, A.125.

(a) **Introduction.**

The district court held that the State's tax as applied to non-Indians purchasing cigarettes from tribal retailers had been preempted by passage of tribal ordinances taxing the same transaction. The court determined that the Tribes were exercising federally delegated powers in taxing non-Indians and that the state's tax would conflict with the exercise of this power. (J.S. App. 35). This is the most troublesome aspect of the court's opinion. For it would permit tribes, by the mere stroke of a pen, to divest the State of its sovereign power of taxation over its own non-Indian citizens. This holding goes far beyond any rulings of this Court and results in a fundamental reallocation of powers among states, Indian tribes and the federal government.

Before turning to the questions of whether there has been a delegation of federal power to the Tribes, and, if so, whether the State's tax conflicts with this federal power, it is useful to begin with an analysis of the source and purposes of federal power in this area. By so doing, it will quickly become apparent that the district court's analysis proceeded on a fundamentally wrong basis.

The source of federal authority over Indian affairs is found in the Commerce Clause, U.S. Const., Art. I, §8, cl. 3 and the treaty making power, U.S. Const., Art. II, §2, cl. 2. *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 172 n. 7 (1973). Congress, in the implementation of these constitutional powers, has enacted numerous treaties and statutes defining the limits of state power over Indian tribes and their members. The overriding policy of Congress in enacting these treaties and statutes has been to secure to Indian tribes the power to govern themselves, free from state interference. *See Warren Trading Post Co. v. Arizona State Tax Comm'n*, 380 U.S. 685, 686-687 (1965).

This congressional policy is made applicable to the states through operation of the Supremacy Clause, U.S. Const., Art. VI, cl. 2. *Moe v. Confederated Salish &*

Kootenai Tribes, 425 U.S. 463, 481 n. 17 (1976). By definition, this power is vested exclusively in the federal government. It is not vested in Indian tribes as a matter of their inherent sovereignty. Thus, the proper analysis is that outlined by this Court in *McClanahan, supra*, 411 U.S. at 172:

> "* * * the trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal preemption. *See Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973). The modern cases thus tend to avoid reliance on platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes which define the limits of state power."

The following analysis heeds the dictates of *McClanahan*. We will examine the applicable treaties and statutes — read against the background of the Indian sovereignty doctrine — and in so doing will show that state taxation of non-Indians purchasing cigarettes from tribal retailers conflicts with no treaty right or federal statute dealing with the affairs of reservation Indians. Thus, there is no basis for federal preemption.

(b) **The relevant treaties and statutes, construed against the backdrop of Indian tribal sovereignty, do not constitute federal preemption of the State's power to tax its non-Indian citizens purchasing cigarettes from tribal retailers.**

(i) **Indian tribes, in the exercise of inherent tribal sovereignty, have no power to tax non-Indians doing business on a tribe's reservation.**

An Indian tribe has no power to tax non-Indians as a matter of "inherent tribal sovereignty". Recently, this Court in *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978), explained the limits of a Tribe's sovereign power as follows:

> "Indian tribes do retain elements of 'quasi-sovereign' authority after ceding their lands to the United States

> and announcing their dependence on the Federal Government. * * * [However,] Indian tribes are prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress *and* those powers '*inconsistent with their status*'." *Oliphant, supra,* 435 U.S. at 208 (citation omitted).

Among those powers which are inconsistent with tribal status is the general power of taxation as applied to non-Indians. Such power is, of course, a central attribute of sovereignty. And Indian tribes are proscribed from exercising any powers of sovereignty over persons other than tribal members. In *Oliphant*, the Court noted that the limitation upon a Tribe's sovereignty "* * * amounts *to the right of governing every person within their limits except themselves*." *Oliphant*, 435 U.S. at 209, quoting *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810) (emphasis in *Oliphant* original).

In *United States v. Wheeler*, 435 U.S. 313 (1978), the court further explained what aspects of tribal sovereignty had been withdrawn and what are retained.

> "[T]he internal affairs of the Indians remained exclusively within the jurisdiction of whatever tribal government existed. * * * [T]he sovereign power of a tribe to prosecute its members for tribal offenses clearly does not fall within that part of sovereignty which the Indians implicitly lost by virtue of their dependent status. *The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe.*" *Wheeler, supra,* 435 U.S. at 324-326 (Emphasis supplied).

The district court identified the case of *Iron Crow v. Oglala Sioux Tribe*, 231 F.2d 89 (8th Cir. 1956) as standing for the proposition that Indian tribes have power to tax non-Indians. But *Iron Crow* and this Court's decisions cited therein — *Morris v. Hitchcock*, 194 U.S. 384 (1904) and *Buster v. Wright*, 135 F. 947 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599 (1906) — do not support the tribal exercise of general taxing power over non-Indians as an

attribute of inherent tribal sovereignty. Rather, the cases stand for the proposition that an Indian tribe, in the exercise of *treaty powers* to exclude non-members of the tribe from the tribe's reservation without the permission of the tribe may impose terms in a nature of a license or permit fee upon which such permission will be granted.[55] *Morris v. Hitchcock*, 194 U.S. 384 (1904), involved a tribal ordinance of the Chickasaw Nation requiring non-members of the tribe grazing livestock on tribal lands to obtain a permit and pay an annual permit tax. The Supreme Court found that the Curtis Act, 30 Stat. 495, ch. 517 (1898), had authorized the continued existence of the permit tax system utilized by the Chickasaw Nation prior to 1898. The source of the tribe's power to establish the permit tax system was, however, its treaty power to exclude non-members of the tribe.

Similarly, *Buster v. Wright, supra,* involved a license tax imposed on the privilege of non-members doing business on the Creek Nation. The court found that various acts of congress between 1888 and 1901 had reaffirmed the treaty right which gave the tribe the authority to fix the terms upon which non-members of the tribe might conduct business within its territorial boundaries. The court held that "the payment of this tax is a mere condition of the exercise of this privilege * * *", 135 F. at 949.

Thus, none of the cases stand for the proposition that inherent tribal sovereignty is the basis of the power to tax non-Indians doing business on an Indian reservation. The cases only support the proposition that Indian tribes may impose certain conditions on non-Indians who desire to exercise the privilege of residing or doing business on the reservation. The cases uphold the concept of limiting entry under certain conditions through the use of licenses,

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[55] *Accord*, 1 Final Report of American Indian Policy Review Commission, 178 (1977). The Commission apparently reads *Iron Crow* as approving the power to tax non-Indians as a matter of inherent sovereignty. But *Iron Crow* cannot be so read. And even if it could be so read, it is not binding on this Court.

and a fee or tax accompanying the license. This power is not unlike the power of any land owner to extract payments in various forms as a condition for the granting of a lease, profit or easement.

(ii) **State taxation of non-Indians purchasing cigarettes on an Indian reservation does not conflict with a Tribe's treaty right to exclude such non-Indians.**

As is apparent from the immediately preceding discussion, whatever powers tribes may have to tax non-Indians, it is clear that the source of this power is a treaty right to exclude non-members of the tribe from the Tribes' reservations.[56] *Morris v. Hitchcock, supra.* Because the Supremacy Clause prevents states from interfering with the exercise of treaty rights, the question then becomes whether state taxation of non-Indians purchasing cigarettes from reservation retailers interferes with the Tribes' treaty right to exclude.[57]

To state the question is to answer it. State taxation of non-Indians dealing with reservation Indians does not and cannot interfere with the Tribes' right to exclude these same non-Indians from the Tribes' reservation.

[56]The district court did not base its preemption analysis upon any treaty rights held by appellee Tribes. Consequently, it cited no treaty provisions which would arguably serve as a basis for taxing non-Indians. These treaty provisions exist, and are set forth in the Appendix to this brief. *See* Br. App. 3a (Yakima); Br. App. 1a (Lummi); and Br. App. 2a (Makah). We have been unable to identify any treaty right or federal enactment which affects the Colville reservation, however. Perhaps this is the reason the district court eschewed any analysis of the treaties. Because the state's tax does not conflict with the Tribes' treaty rights, it is not necessary to discuss the impact of subsequent federal legislation (*e.g.*, The General Allottment Act of 1887) "opening up" the Tribes Reservations for settlement by non-Indians, and the state takes no position on the issue.

[57]It is not necessary to discuss whether this "treaty right" is a "retained right" of the Tribes or whether it is a right conferred upon the Tribes by the United States. In neither case does the power of the State to tax non-Indians interfere with this right.

Whatever the requirements the Tribes may impose upon non-Indians as a condition precedent to entry on the Tribes' reservations (including the requirement of a "permit fee" or "tax") the fact of the matter is that these conditions are based upon the Tribes' power to exclude. Presumably, the Tribes' remedy for violation of these conditions (*e.g.*, non-payment of the tax) would be expulsion, with the aid of the United States, of non-Indians refusing to abide by such conditions. *See Morris v. Hitchcock, supra.*

State taxation of non-Indians dealing with reservation Indians does not conflict with the Tribes' right to exclude these same non-Indians. The State is not contending that it has the power to require the Tribes to sell cigarettes to non-Indians or otherwise admit them to their reservations. The State's cigarette and sales taxes here in question are general excise taxes, imposed upon non-Indians with respect to *their* use, possession, or consumption of cigarettes. RCW 82.24.020. These state taxes are in return for the privileges, opportunities and benefits afforded its non-Indian citizens by the State.

The Tribes' treaty right to condition the entry of non-Indians on their reservations does not carry with it a right to market a tax exemption for non-Indian citizens of the State of Washington. Nothing in this Court's decision in *Morris v. Hitchcock*, 194 U.S. 384 (1904) or, for that matter, the Eighth Circuit's decision in *Iron Crow v. Oglala Sioux Tribe*, 231 F.2d 89 (8th Cir. 1956) leads to such a conclusion. Non-Indians doing business on the Tribes' reservation are subject to the jurisdiction of the State. *Thomas v. Gay*, 169 U.S. 264 (1898). Clearly, the State is entitled to tax its non-Indian citizens in return for the opportunities, protections, and benefits rendered by the State.

(iii) **State taxation of non-Indians purchasing cigarettes on an Indian reservation does not conflict with any federal legislation designed to**

revitalize tribal self-government or foster tribal economic development.

The district court identified several federal enactments designed to revitalize tribal self-government or foster tribal economic development which were urged upon it as a basis for federal preemption. The court rejected the argument that the Indian Traders Act, 25 U.S.C. §261 (1976), *et seq.* constituted federal preemption of a state's power to tax non-Indians (J.S. App. 29). The court further rejected the argument that enactments designed to revitalize tribal self-government or foster economic development, *e.g.*, the Indian Reorganization Act, 25 U.S.C. §476 (1976), *et seq.*, the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §450 (1976), *et seq.*, and the Indian Financing Act of 1974, 25 U.S.C. §1451 (1976), *et seq.* supported a finding that the state's tax on non-Indians was federally preempted. As noted by the court (J.S. App. 30):

> "* * * The Supreme Court has never suggested that any of these statutes has of its own force established a policy of implied tax immunity for Indian tribes or those dealing with Indian tribes."

Indeed, insofar as tribal economic development is concerned, state tax immunity for Indian tribes and those with whom they deal is contrary to the intent of the Indian Reorganization Act. In *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), this Court refused to find in the IRA an implied exemption from state taxation for an Indian Tribe engaged in business outside the boundaries of the Tribe's reservation. The court quoted Representative Howard, one of the Act's sponsors, as follows:

> "The program of self-support and of business and civic experience in the management of their own affairs, combined with the program of education, will permit increasing numbers of Indians to enter the white world on a footing of equal competition." *Mescalero, supra,* 411 U.S. at 152.

If the intent of the IRA was to "* * * permit * * * Indians to enter the white world on a footing of

equal competition * * *", how is that served by providing the Indian with a huge competitive advantage over non-Indian cigarette retailers? It is not. In fact, the competitive advantage afforded Indian retailers by immunizing non-Indian purchasers from state taxation would tie the Indian retailer to the uncertain vagaries of a state tax policy favoring, at this time, a high rate of taxation on cigarettes. If the State were to abolish or drastically reduce its cigarette tax, what would the tribal retailer be left with? Nothing more than a stock of stale cigarettes and fond memories of the "good old days", we suggest. Therefore, implying a tax exemption in the IRA for non-Indian purchasers is at best a cruel hoax on the legitimate aspirations of Indian Tribes and their members for meaningful economic development on the Tribes' reservations.

We, of course, agree with the district court's finding in this regard. More importantly, we agree with the analysis employed by the district court. *None of these statutes have established a federal policy of providing non-Indians with immunity from state taxation when dealing with Indian tribes.*

How then did the district court find that passage of tribal ordinances afforded these non-Indians the precise immunity from state taxation which no federal enactments sanction? It is to this question which we now turn.

(c) Section 16 of the Indian Reorganization Act of 1934 does not delegate to Indian Tribes the power to tax non-Indians purchasing cigarettes from tribal retailers.

The district court held that the Tribes were exercising federally delegated power in imposing their tax on non-Indians purchasing from tribal retailers. The court found this delegation in section 16 of the Indian Reorganization Act of 1934, 25 U.S.C. §476 (1976), which, in the court's view, *delegated* to the tribes "* * * powers vested in any Indian tribe or tribal council by

existing law." And, according to the lower court, "[t]he power to tax Indians and non-Indians was one of those powers. *Iron Crow v. Oglala Sioux Tribe*, 231 F.2d 89 (8th Cir. 1956)." (J.S. App. 34) The lower court then found that imposition of the State's tax in addition to the tribal tax would frustrate "* * * the objectives of congress in making the delegation of power and of the tribe in passing the taxation ordinances for tribal usage * * *" (J.S. App. 35) Thus, the court reasoned that the State's tax had been preempted.

First, assuming that Congress has the power to tax non-Indians purchasing goods from Indians, there has been no affirmative delegation of this power to Indian tribes. Section 16 of the IRA does not grant to Indian tribes the power to tax non-Indians, but only recognizes that a constitution adopted by a tribe pursuant to the IRA may include "* * * all powers vested in any Indian tribe or tribal council by existing law." 25 U.S.C §476 (1976). In two recent cases decided by this Court, *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) and *United States v. Wheeler*, 435 U.S. 313 (1978), the Court had occasion to comment upon the scope of the Indian Reorganization Act. In *Oliphant*, the Court stated that "the Indian Reorganization Act merely gives each Indian tribe the right 'to organize for its common welfare' and to 'adopt an appropriate constitution and bylaws.' * * *" *Oliphant, supra*, 435 U.S. at 195, n. 6. And, in *Wheeler*, again noting that the IRA merely authorized the tribe to adopt a constitution for self-government, the Court said that the act did not *create* the power of Indians to govern themselves and to punish crimes committed by their own members. *Wheeler, supra*, 435 U.S. at 327-328.

Thus, this Court has rejected the interpretation of the IRA as delegating the sovereign power of the United States to Indian tribes in favor of the obvious interpretation of the Act as merely facilitating the organization of tribal government for the regulation of the internal affairs of a tribe. Therefore, to the extent that the district court's

preemption analysis was predicated upon a finding that §16 of the IRA delegates taxing powers over non-Indians to the Tribes, the analysis is incorrect.

The court compounded this error by characterizing tribal power to tax non-Indians as a federally delegated power of *general taxation, i.e.*, a full exercise of a sovereign right to tax in order to raise revenue. The tribal power to tax non-Indians is not a federally delegated power — it is a treaty power. *See* pp. 78-79, *supra*. Furthermore, the power is not one of general taxation, but rather it is a limited power based upon a treaty right to exclude non-Indians from the Tribes' reservations.[58] And, as we have already demonstrated at pp. 78-79, *supra*, a state tax on non-Indians purchasing cigarettes from tribal retailers does not conflict with that power.

In sum, the district court arrived at its conclusion that Indian tribes could market a tax immunity to non-Indians by mistakenly assuming that §16 of the IRA delegated a federal power of general taxation to the Tribes.[59] That enactment, of course, does no such thing,

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[58]Characterizing the tribal power to tax non-Indians as a general power of taxation raises a number of troublesome questions about the rights of non-members of the Tribe paying a tax to a government in which that person has no right to representation. *See* 1 Final Report of the American Indian Policy Review Commission, 179-181, 595-596 (1977).

> "Such [tribal] taxation raises the question of the rights of a nonmember of the tribe paying a tax to a government in which that person has no right to representation. Governments generally, however, may tax noncitizens without regard to representation when they are within the territorial jurisdiction of that government. However, where non-Indians live within the boundaries of the reservation and have no hope of ever becoming members of the tribal government, the issue is more difficult." Commission Report, *supra*, p. 179

[59]This assumption, even if correct, provides no help to the court's result reached with respect to the Yakima, Lummi and Colville Tribes — none of which are organized pursuant to the IRA. Indeed, the Lummi and Colville Tribes specifically rejected the IRA, J.S. App. 33. If so, these Tribes rejected the purported delegation of federal taxing power.

and there is nothing in the history or purposes of the IRA which counsels otherwise.

Thus it is now understandable how the district court could find, on the one hand, that the policy underlying the IRA did not require state tax immunity for non-Indians dealing with reservation Indians and, on the other hand, find that a tribal exercise of purported IRA power required a finding of state tax immunity for the same non-Indians. With all due respect, the analysis ignores this Court's dictate in *McClanahan, supra,* 411 U.S. at 172, that it is the "* * * applicable *treaties* and statutes which define the limits of state power." (Emphasis supplied)

As a result, the district court ousted the State of its sovereign power to tax non-Indians going upon Indian reservations. Nothing in the history of this Court's decisions resolving conflicts between state and tribal jurisdiction requires such a result. In fact, this Court's decision in *Moe v. Confederated Salish & Kootenai Tribes,* 425 U.S. 463 (1976), conclusively resolves the question in favor of state taxing power over non-Indians purchasing cigarettes from tribal retailers. It is to this argument which we now turn.

5. **This case is factually and legally indistinguishable from *Moe.***

Insofar as is relevant here, *Moe, supra,* involved an attempt by the State of Montana to require Indian retailers to collect and remit cigarette excise taxes, the legal incidence of which fell upon non-Indian purchasers. The Tribe had an ordinance which regulated the sale of cigarettes on the reservation. The tribal scheme was explained by the district court as follows:

> "The land is leased from the Tribes upon the Tribal Council's approval of the lessee's plan to erect a smoke shop. The Council controls the purchase of cigarettes for resale by Tribal members and charges an administrative fee in connection therewith." *Confederated Salish & Kootenai Tribes v. Moe,* 392 F.Supp. 1297, 1313 (D.Mont., 1975).

The primary purpose of the tribal scheme was to establish a "tax haven" for the benefit of non-Indian consumers seeking to avoid payment of a lawful tax to the state. As stated by the lower court in *Moe*:

> "It may reasonably be inferred that the stores were not established primarily for the benefit of Indian customers residing on the Reservation, but rather to sell cigarettes to prospective customers passing on the highway and others who come from neighboring communities to purchase cigarettes at a price substantially lower than the going price off the Reservation. The Indian seller profits from increased sales. The non-Indian purchasers avoid the payment of a tax legally imposed upon them." 392 F.Supp. at 1311.

The situation in the instant case is no different from that in *Moe*. The legal incidence of Washington's cigarette and sales taxes falls upon the non-Indian purchaser. The tribes, by ordinance, effectively control the sale of cigarettes to non-Indians on the reservation. The primary purpose of the tribal ordinances is to establish a "tax haven" for non-Indians seeking to avoid payment of the state's cigarette and sales taxes. Under these circumstances, the state's tax, as applied to non-Indians, is neither preempted by tribal ordinance nor infringes in any way upon tribal self-government.

First, as held by the district court, the legal incidence of Washington's cigarette tax falls upon the non-Indian purchaser (J.S. App. 23).[60] The basis of the district court's holding in this regard was its conclusion that the legislature intended the legal incidence of the tax to be imposed at the earliest constitutional opportunity. As stated by the court:

> "Where on-reservation tribal sales to non-Indians are involved, the first taxable event is, therefore, the use

[60]All parties concede that the legal incidence of the sales tax, chapter 82.08 RCW, falls upon the non-Indian purchaser. *See* RCW 82.08.050 (Br. App. 19a), which has been construed by the Washington State Supreme Court in *Murray v. State,* 62 Wn.2d 619, 384 P.2d 337 (1963) to place the legal incidence of the sales tax on the buyer.

> or consumption by the non-Indian purchaser. In such situations, the legal incidence falls upon the non-Indian purchaser rather than the tribal seller." (J.S. App. 23)

Thus, insofar as state taxing schemes are concerned, Washington's sales and cigarette tax are indistinguishable from the Montana cigarette tax involved in *Moe, supra.*

The Tribes' ordinances regulating and taxing the sale of cigarettes are equally indistinguishable from those involved in *Moe.* To recap, in *Moe,* the "smoke shops" were on trust land which was leased to members of the tribe for purposes of operating a retail cigarette business. The Tribe controlled the purchase of cigarettes for resale by tribal members and charged an administrative fee. However, the Flathead Tribe did not impose a "tax" on any cigarettes sold, whether to Indians or non-Indians.

Here, in the case at bar, the tribal smoke shops are located on trust or restricted status land. (*Colville* Pre-trial Order, ¶2.5, A.32; *Yakima* Pre-trial Order ¶5.7, A.173). The tribes control the purchase of cigarettes for resale by tribal members. (*Colville* Pre-trial Order ¶2.5, A.32; *Yakima* Pre-trial Order ¶5.7, A.173). Each Indian retailer is licensed by the Tribe to sell cigarettes. (*Colville* Pre-trial Order ¶2.5, A.32; *Yakima* Pre-trial Order ¶5.7, A.173). In the *Colville* case, the tribes claim to be in the "retail" business, retaining title to the cigarettes until sold to the ultimate consumer (*i.e.*, non-Indian).[61] The Yakima Tribe occupies the position of a wholesaler to its tribally-licensed retailers. (*Yakima* Pre-trial Order ¶5.7, A.173).

[61]However, this claim is largely illusory. In practical operation and effect the Colville and Lummi Tribes act as "wholesalers" to their respective tribal licensees. As detailed in the pre-trial order, ¶2.5, the relationship between the Tribe and its licensed retailers is described in part as follows:

> The Colville and Lummi Tribes furnish the operators of their tribal tobacco outlets only with cigarettes and tobacco products pursuant to their tribal ordinances. The operators themselves are required to furnish working capital and pay all business expenses. As remuneration for managing a tribal tobacco outlet, each operator is entitled to retain the gross revenue derived from sales of cigarettes and tobacco products in excess of the wholesale distribution price and excise tax levied by the respective tribe."

In the *Colville* case, the Tribes do not charge an "administrative fee" as such to cover their wholesaling expenses. However, the wholesaling price charged by the Tribes to their licensed retailers includes all expenses incurred by the Tribes.[62] Each of the Tribes imposes a tax on the "distribution" of cigarettes, collected at the time the cigarettes are distributed to the licensed retailer. (*See, e.g.*, Colville Ordinance, section 8, A.107). The tax is to be added to the retail selling price and passed on to the consumer. (*See, e.g.*, Colville Ordinance, section 8, A. 107).

In the *Yakima* case, the Tribe imposes a "permit fee" on the licensed retailers with respect to each package of cigarettes sold. Section 4 of the Yakima Ordinance (A.209) provides:

> "Section 4. A tribal permit to sell or distribute cigarettes under this resolution shall be twenty-five dollars ($25.00) annually and a permit fee of two and one-quarter cents (2¼ cents) per package of the smallest container of cigarettes sold or distributed. Tender of the initial permit fee shall be made at the time of application and other permit fees shall be paid at the time of each and every delivery of cigarettes."

In sum, insofar as the Tribes' involvement is concerned, there is no meaningful distinction between the four Tribes involved in this case and the tribe involved in the *Moe* case. Each Tribe acts as a wholesaler to its licensed retailers. The Yakima Tribe charges a "permit fee" to its retailers just as the tribe in *Moe* did. Although

[62]This follows from the definition of "wholesale distribution price" contained in section 2 of each of the Tribes' ordinances:

> " 'Wholesale distribution price' shall mean the price paid for each tobacco product by the tribes together with all freight charges and other expenses incurred by the tribes in their receipt and distribution." (A.106 [Colville Ordinance]; A.120 [Lummi Ordinance]; A.113 [Makah Ordinance]).

the Tribes involved in the *Colville* case did not charge a "permit fee" or "administrative fee" the net effect of its "tax" is exactly the same. The "permit fee" of 2¼ cents per package imposed by the Yakima Tribe is as much a "tax" as the 4 cents per package "tax" imposed by the Colville Tribe or vice versa. Even assuming that there is a meaningful distinction between a "tax" and an "administrative fee", it must be remembered that we are talking abut a conflict between the *power* of a tribe and the state to impose a tax. Therefore, whether a tribe chooses to exercise its taxing power by means of an "administrative fee" as in *Moe* and the *Yakima* case, or through a "tax" as is the case with the tribes involved in the *Colville* case, it is irrelevant to a resolution of the conflict involving the exercise of the taxing power. In short, if Montana's tax was not preempted by the Flathead Tribes' "administrative fee" there is no reason why Washington's cigarette tax should be preempted by the Tribes' "tax" or "permit fee".

Third, in both *Moe* and the instant case, the tribal scheme was designed to create a "tax haven" by attracting non-Indian purchasers seeking to escape the imposition of the state's tax. In *Moe*, the district court found that "it is the non-Indian consumer or user who saves the tax and reaps the benefit of the tax exemption." 392 F.Supp. at 1308. As this Court noted in *Moe:*

> "Since nonpayment of the tax is a misdemeanor as to the retail purchaser, the competitive advantage which the Indian seller doing business on tribal land enjoys over all other cigarette retailers, within and without the reservation, is dependent on the extent to which the non-Indian purchaser is willing to flout *his* legal obligation to pay the tax. Without the simple expedient of having the retailer collect the sales tax from non-Indian purchasers, it is clear that wholesale violations of the law by the latter class will go virtually unchecked." *Moe, supra,* 425 U.S. at 482 (footnote omitted).

Here, nonpayment of the tax by non-Indian purchasers constitutes a gross misdemeanor under Washington law. RCW 82.24.110.[63] The competitive advantage which the Indian retailer enjoys over non-Indian retailers is sufficient to attract non-Indian customers from as much as 40 miles away, seeking to avoid payment of the state's tax.[64] For example, the competitive advantage enjoyed by the licensed retailers of the Yakima Tribe amounts to $1.05 per carton of cigarettes.[65] This price differential is

[63]RCW 82.24.110 provides in pertinent part as follows:

"Each of the following acts is a gross misdemeanor and punishable as such:

* * *

"(4) To violate any of the provisions of this chapter;

"(5) To violate any lawful rule or regulation made and published by the department of revenue;

* * *

"(11) For any person to receive in this state any shipment of any of the articles taxed herein, when the same are not stamped, for the purpose of avoiding payment of tax. It is presumed that persons other than dealers who purchase or receive shipments of unstamped cigarettes do so to avoid payment of the tax imposed herein."

[64]Dr. Cyril C. Herrmann, the Yakima Tribe's economic expert, in explaining why requiring the Tribe to collect the State's cigarette and sales tax would put tribal smoke shop operators out of business explained as follows:

> "Now by the time I got clear over to visit with Holt-Brewer on the eastern side of the reservation I found another kind of demand elasticity problem. His customers drive from the Tri-Cities, which is some 40 miles southeast of his smoke shop. And so, he simply isn't able to charge $3.80 a carton. And he told me that his average carton of cigarettes goes at $3.60 a carton. But more than that, the people in the Tri-Cities will go together. And so you'll have, if you will, pooled purchases. In other words, there would be four or five neighbors or friends and they'll all place their order. And then a single automobile will make that drive. And so the average size of sale, therefore, will also be larger. Holt-Brewer would sell six cartons, ten cartons or even more than ten cartons." (Deposition of Cyril C. Herrmann, *Yakima* case, pp. 23-24).

Dr. Herrmann later testified that in fact the average sale at the Holt-Brewer smoke shop was *twenty cartons of cigarettes.* (Herrmann Deposition, A.234).

[65]The average price of a carton of cigarettes sold by a tribal retailer to a non-Indian purchaser is $3.95 per carton; the average price of a carton of cigarettes sold by a non-Indian retailer to a non-Indian is $5.00 per carton. (*Yakima* Pre-trial Order, ¶5.22, A.185).

due almost entirely to differences in tax liability. (*Yakima* Pre-trial Order, ¶5.22, A.186).

The non-Indian purchaser avoids the state's $1.60 cigarette tax and the $.25 sales tax ($.05 x $5.00). In return, the Tribe acquires its tax and the licensed retailer reaps a profit limited only by what the market will bear.

The Tribes' economic experts testified that it is the Tribe and their retailers who are bearing the economic burden of the State's tax. This is similar to the argument advanced by the Tribes in *Moe, supra,* to the effect that the Indian retailer was being taxed because he suffered a "measurable out-of-pocket loss". *Moe, supra,* 425 U.S. at 481. But, just like in *Moe,* the economic testimony ignores the fact that it is the non-Indian consumer who reaps the benefit of the tax exemption. Whatever economic burden the Tribe and its retailers may bear is simply a burden resulting from being unable to market a tax exemption to non-Indian consumers. *Moe* tells us that no such right to market a tax exemption exists.

In sum, the factual situation in the instant case is indistinguishable from that presented in *Moe.* In each case, the legal incidence of the state's tax fell upon non-Indian consumers. In each case, the Tribe imposed an "administrative fee" or "tax" — call it what you will, the legal and practical effect is the same — on the sale of cigarettes to non-Indian consumers. And in each case, it is the non-Indian consumer who reaps the benefit of the tax exemption. Under these circumstances, this court in *Moe* found that imposing a collection responsibility on Indian retailers did not contravene federal law and did not interfere with tribal self-government.

The same is true with respect to the State's power to impose its tax on its own non-Indian citizens purchasing cigarettes from tribally-licensed vendors. Certainly, if this Court sanctioned the direct application of state law to reservation Indians in the situation presented in *Moe,* it should sanction a direct application of state law to non-Indians in this case. The lesson to be derived from

Moe is simply that Indian Tribes have no legitimate right to market their immunity from state law to non-Indians. In circumstances where non-Indians seek to clothe themselves with such tribal immunity, a state may not only deny that immunity to non-Indians, but also require the Tribes and their members to assist the state in assuring that violations of state law do not go unchecked.

That is all the State asks in this appeal.

IV. A STATE MAY IMPOSE UPON AN INDIAN TRIBE AND/OR ITS LICENSED INDIAN RETAILERS THE OBLIGATION TO COLLECT STATE EXCISE TAXES IMPOSED UPON THEIR SALES OF PERSONAL PROPERTY TO INDIAN PURCHASERS OTHER THAN MEMBERS OF THE TRIBE OCCUPYING THE RESERVATION, WHERE THE LEGAL INCIDENCE OF THE TAX FALLS UPON THE INDIAN PURCHASER, DESPITE THE FACT THAT THE TRIBE HAS ADOPTED ORDINANCES TAXING THESE SAME TRANSACTIONS.

A. INTRODUCTION.

This portion of our brief involves the question of whether an Indian has a right to be free from state taxation when he or she resides on an Indian reservation other than that of his or her own Tribe. The issue is raised only in the *Yakima* case.

Under Washington law, reservation Indians are exempt from state cigarette and sales taxation only where the purchase takes place on the reservation of the tribe to which the Indian belongs. *See* Washington Administrative Code (WAC) 458-20-192 (Br. App. 38a) which, in dealing with tax liability of Indians, states in part:

> "For purposes of this rule, with respect to determining tax liability regarding any economic transaction or activity, the term 'Indian tribe' includes only an Indian tribe upon and within whose Indian reservation such transaction or activity occurs, and the term 'Indian' includes only a person duly registered on the

tribal rolls of the Indian tribe upon and within whose Indian reservation such transaction or activity occurs."

The district court held, *inter alia*, that the state is without power to tax reservation Indians who are not members of the tribe occupying the reservation (J.S. App. 54-55). In so doing, the court relied upon the opinion of the district court in *Confederated Salish & Kootenai Tribes v. Moe*, 392 F.Supp. 1297, 1312 (D. Mont. 1975). However, the issue of state taxing power over Indians who are not members of the reservation tribe was not before this Court on appeal in *Moe, supra*, and this Court expressed no opinion as to the lower court's holding. *See Moe, supra*, 425 U.S. at 480, n. 16.[66] Accordingly, the state regards this issue as still open.

B. STATE TAXATION OF RESERVATION INDIANS WHO ARE NOT MEMBERS OF THE TRIBE UPON WHOSE RESERVATION THE TAXABLE TRANSACTION OCCURS IS NOT PREEMPTED BY FEDERAL LAW AND DOES NOT CONSTITUTE IMPERMISSIBLE INTERFERENCE WITH THE RIGHT OF TRIBAL SELF-GOVERNMENT.

1. Federal preemption.

The question here is whether the federal government has preempted the field with regard to state taxation of Indians who have left their own reservations. This question must be decided with reference to the particular treaties and federal statutes which define the limits of state power over Indians. *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973). And, of course, absent clear statutory guidance courts will not imply tax

[66]"The District Court noted two further distinctions within its ruling. It extended its holding to sales of cigarettes to Indians living on the Flathead Reservation irrespective of their actual membership in the plaintiff Tribe. The State has not challenged this holding, and we therefore do not disturb it. * * *" *Moe, supra*, 425 U.S. at 480, n. 16.

exemption. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973).

Here, the district court cited no treaty rights or federal statutes in support of its holding that Indians who are not members of the tribe are entitled to exemption from state taxation. Rather, it relied solely upon the district court's holding in *Confederated Salish & Kootenai Tribes v. Moe*, 392 F.Supp. 1297 (D. Mont. 1975) wherein that court, apparently relying on *McClanahan, supra*, and *Mescalero, supra*, held that the Montana cigarette tax could not be imposed on sales to Indians who are residents of the Flathead Reservation, irrespective of tribal membership.[67]

McClanahan involved an income tax imposed upon a member of the Navajo Tribe residing on the Navajo Reservation where the income was derived entirely from reservation sources. That case thus obviously provides no basis for holding that a state may not tax Indians who are *not* members of the reservation tribe. And *Mescalero* involved a state tax imposed on the tribe operating a business off the reservation. Thus it too provides no basis for a holding that a state may not tax Indians who are not members of the reservation tribe. Therefore, to the extent that the district court here relied upon the district court in *Moe, supra*, in ruling to the contrary, there is no basis for its decision.

It is true that other lower courts which have considered the problem have generally held that Indian tax immunities apply to Indian people who reside on the reservation but are not enrolled members of the tribe occupying the reservation. *See, e.g., Fox v. Bureau of Revenue*, 87 N.M. 261, 531 P.2d 1234 (1975), *cert. denied*, 424 U.S. 933 (1976); *Dillon v. State of Montana*, 451 F.Supp. 168 (D. Mont. 1978). The rationale for these

[67]The lower court seemed to say that, for the very same reasons Montana could impose its cigarette excise tax and require pre-collection on sales to non-Indians, the state could not impose its taxes upon reservation Indians who were not members of the tribe. See, *Moe*, 392 F.Supp. at 1307, n. 19.

decisions is that federal statutes authorizing federal court jurisdiction over crimes committed by Indians on another tribe's reservation (e.g., 18 U.S.C. §1153) and the definition of "Indian" for purposes of the Indian Reorganization Act (25 U.S.C. §479), both manifest congressional power over Indians whether or not on their own reservations. The State, however, does not dispute that congress has assumed jurisdiction for certain purposes over Indians residing on another tribe's reservation. Indeed, congress has assumed jurisdiction over Indians not residing on any reservation. *See, e.g., Morton v. Ruiz*, 415 U.S. 199 (1974) in which the Court construed 25 U.S.C. §13 (1970), dealing with expenditures by the Bureau of Indian Affairs for general assistance to Indians, to encompass and authorize the expenditure of federal funds for non-assimilated needy Indians residing *on or near* an Indian reservation. To be sure, the United States does have an interest in individual Indians and may shield them from state powers wherever they reside. But the question is whether Congress has truly done so in this case.

Clearly, federal criminal jurisdiction over Indians committing crimes on another tribe's reservation (18 U.S.C. §1153 (1976)) affords no basis for automatically shielding those Indians from state taxing power. The "Major Crimes Act", 18 U.S.C. §1153, is a "limited" congressional intrusion into the internal affairs of tribes. The act was based upon congressional conviction that many Indians would be civilized sooner by being subjected to federal criminal law and taught to respect life and property of others. *Keeble v. United States*, 412 U.S. 205 (1973). Its purpose was not to shield Indians from state jurisdiction. Furthermore, it is not at all clear that non-members of the reservation tribe are subject to the Major Crimes Act. Members of terminated tribes are not so subject. *United States v. Heath*, 509 F.2d 16 (9th Cir. 1974). And this Court has recently specifically reserved the question. See, *United States v. Antelope*, 430 U.S. 641, 646, n. 7 (1977).

Similarly, the fact that such Indians fit within the definition of "Indian" for purposes of the Indian Reorganization Act does not require a conclusion that such Indians are thereby exempt from state taxing power. *Cf. Mescalero Apache Tribe v. Jones, supra.* And clearly, there is no specific federal legislation exempting, expressly or by implication, Indians not residing on their own reservation from the reach of state taxing power. Absent clear statutory guidance we submit that this Court should hold that there is no such tax exemption. *Mescalero Apache Tribe v. Jones, supra.*

2. **Tribal self-government.**

The considerations defining the limits of state power over Indians who are not members of the tribe upon whose reservation they reside are grounded in the history of congressional policy fostering tribal self-government — and not any generalized notions of the guardian-ward relationship or the "policy of fostering Indian economic self-development". As explained in *McClanahan, supra*, 411 U.S. at 170:

> "Thus, only a few years ago, this Court struck down Arizona's attempt to tax the proceeds of a trading company doing business within the confines of the very reservation involved in this case. See *Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685 (1965). The tax in no way interfered with federal land or with the National Government's proprietary interests. But it was invalidated nonetheless because 'from the very first days of our Government, the Federal Government had been permitting the Indians largely to govern themselves, free from state interference.'"

The *McClanahan* decision then went on to quote with approval the following statement in U.S. Dept. of Interior, FEDERAL INDIAN LAW, 845 (1958):

> "State laws generally are not applicable to *tribal* Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply. It follows that Indians and Indian property on

an Indian reservation are not subject to State taxation except by virtue of express authority conferred upon the State by act of Congress." (Emphasis supplied) 411 U.S. at 170-171.

The crucial point here is that federal preemption of state tax power, insofar as it applies on Indian reservations, applies only to *"tribal Indians"* on the reservation. State taxation of non-members of the tribe does not, and cannot, interfere with tribal self-government for the simple reason that those Indians are neither constituents nor subject to the jurisdiction of the revervation tribe. Those Indians stand on absolutely no different footing with respect to the reservation tribe than does a non-Indian residing on the reservation. Unless the tribes are somehow willing to concede that Indians who are not members of the tribe have some say, by vote or otherwise, in tribal affairs—or somehow could share in tribal allotments or disbursements, it is clear that taxation of those non-members of the tribe does not amount to interference with tribal self-government. Furthermore, state taxation of those Indians in the face of tribal taxation does not amount to an interference with "tribal self-government" any more than does state taxation of non-Indians. See, pp. 65-73, *supra*.

In conclusion, there is no established federal policy permitting Indians who are non-members of the tribe to purchase tax free cigarettes. State taxation of these Indians who, after all, are citizens of the state and recipients of the opportunities, protections and benefits afforded all state citizens, does not conflict "with any congressional enactment dealing with the affairs of reservation Indians, *United States v. McGowan*, 302 U.S. 535, 539 (1938)," or "frustrates tribal self-government, see *Williams v. Lee*, 358 U.S. 217, 219-220 (1959)." *Moe v. Salish & Kootenai Tribes*, 425 U.S. at 483.

V. A STATE MAY IMPOSE UPON AN INDIAN TRIBE AND/OR ITS LICENSED INDIAN RETAILERS MAKING SALES ON THE RESERVATION TO NON-INDIAN PURCHASERS, NONDISCRIMINATORY REPORTING AND AUDITING REQUIREMENTS DESIGNED TO INSURE THAT TAXES COLLECTED ON SALES TO NON-INDIANS ARE PROPERLY ACCOUNTED FOR.

A. INTRODUCTION.

This appeal also presents several tax enforcement issues, including the power of the state to impose various reporting and auditing requirements to insure tax collection. This Court in *Moe, supra*, as did the district court in *Moe*, declined to pass on any "enforcement issues" pending determination of the liability for collection of state excise taxes imposed upon non-members of the tribe. See, *Moe, supra*, 425 U.S. at 468, n. 6. This issue is present in both the *Colville* and *Yakima* cases.

At the outset, a brief statement of the purposes and methods by which the state seeks to enforce the collection of cigarette and sales taxes on sales by reservation Indians to non-members of the Tribe would be helpful to a more complete understanding of the problem. The purposes of the enforcement scheme are self-evident: first, assuring that retail taxes are in fact charged and collected by retailers and second, assuring that the taxes, once collected, are properly accounted for and remitted to the state.[68] The former consideration is practically self-enforcing, in the sense that if a retailer is not collecting sales tax his competitors soon get wind of the fact and report it to the state. The latter consideration, is, however, not self-enforcing and consequently calls for substantial state control in order to assure that a retailer is not pocketing a portion of the taxes he has collected on behalf of the state.

1. Sales Tax Record Keeping Requirements. In order to guard against the possibility of retailers (whether Indian or non-Indian) attributing sales to

[68]See generally, Washington Administrative Code section 458-20-192, and Excise Tax Bulletin 504.08.192; Br. App. 38a-44a.

non-Indians as sales to Indians (and thus tax free), the state has adopted a series of requirements covering registration and record keeping. These requirements are contained in Excise Tax Bulletin No. 504.08.192 (Br. App. 42a). Pursuant to this ETB, licensed retailers of the Tribe are required to register with the state (without payment of the registration fee) in order that the state will know who is operating the business and what its address is. All retailers are required to keep certain records documenting the tax exempt status of sales to reservation Indians. The following records are required to be kept by all retailers, including the Tribes and their licensed retailers, where such persons make sales to reservation Indians:

(a) Name of the Indian purchaser,

(b) The tribal affiliation of the purchaser,

(c) The Indian reservation to which or within which delivery was made, or within which retail services were rendered,

(d) The dollar amount of the sale and

(e) The date of the sale.

Requirements (a), (b), and (c) are designed to insure that an "audit trail" is available to permit the State to verify that the sale in fact was a valid tax-exempt sale, i.e. a sale to a reservation Indian. This information would permit the State to check, on a random basis, with the purchaser to verify the fact of purchase. Requirements (d) and (e) are designed to establish an "audit trail" permitting verification of the total dollar amount of tax exempt sales claimed by retailers. Without these requirements, as is implicit in the fact of their adoption, the State Department of Revenue is concerned that wholesale tax avoidance or fraud could be perpetrated with impunity upon the State. And, of course, it is the people of the State and the vast majority of honest retailers who would suffer the consequences.

2. **Cigarette Tax.** The foregoing record keeping requirements to not apply to the cigarette excise tax on retail sales of cigarettes to non-Indians. Rather the state cigarette tax, as was Montana's tax in *Moe*, is enforced by

the "stamp" method. Under this method, wholesalers or retailers purchase stamps from the State Department of Revenue (and pay the cigarette tax) and affix these stamps to individual packages of cigarettes prior to the time of sale. RCW 82.24.030 (Br. App. 22a)[69]

However, no stamps are required to be affixed in the case of sales of cigarettes by Indian tribal organizations to their members. RCW 82.24.050[70] permits Indian tribes to retain unstamped cigarettes "intended for sale to qualified purchasers". The term "qualified purchasers" is limited to enrolled members of the tribe making the sale, including those members who reside off the reservation. This follows from RCW 82.24.260[71] which exempts from the duty of collecting the tax "a federally recognized Indian tribal organization with respect to sales to enrolled members of the tribe * * *" Reading RCW 82.24.050 and 82.24.260 *in pari materia*, the statutory pattern indicates that Indian tribal organizations are permitted to possess unstamped cigarettes (RCW 82.24.050) and to make sales to enrolled members of the tribe without collecting the tax (RCW 82.24.260). Further, in view of the holding in *Tonasket v. Washington (Tonasket II), 84 Wn.2d 164, 525 P.2d 744 (1974), appeal dismissed,* 420 U.S. 915 (1975), the statutory exemption from affixing stamps extends to *individual Indian retailers* licensed by the tribe with respect to sales to enrolled members.

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[69]RCW 82.24.030 (Br. App. 22a) provides in pertinent part as follows:

> "In order to enforce collection of the tax hereby levied, the department of revenue shall design and have printed stamps of such size and denominations as may be determined by the department, such stamps to be affixed on the smallest container or package that will be handled, sold, used, consumed, or distributed, to permit the department to readily ascertain by inspection, whether or not such tax has been paid. Every person shall cause to be affixed on every package of cigarettes on which a tax is due, stamps of an amount equaling the tax due thereon before he sells, offers for sale, uses, consumes, handles, removes, or otherwise disturbs and distributes the same * * *."

[70]Br. App. 24a.

[71]Br. App. 26a.

Indian retailers making sales to non-Indians, however, are still required by statute to affix stamps. RCW 82.24.260, *supra*, merely provides that if a retailer sells unstamped cigarettes he is to collect the tax and remit it at the same time and in the same manner as the retail sales tax. The statute specifically provides that the duty of the retailer (imposed by RCW 82.24.050) to affix stamps is not affected. Accordingly, the statutory scheme for enforcing the cigarette tax on sales by reservation Indians to non-Indians requires that stamps be affixed prior to the time of sale.

In light of the difficulties with Montana's scheme of "pre-collection" by means of stamps noted in *Moe*, 425 U.S. at 468, n. 6, it should be emphasized that Washington's cigarette tax stamping scheme does not require "pre-collection" on sales of cigarettes by reservation Indians to non-Indians. First, there is no statutory requirement that persons who acquire cigarette stamps from the Department pay for such stamps upon receipt. Indeed, a departmental regulation, WAC 458-20-186[72] provides for deferral of payments for a 30-day period for cigarette vendors who furnish a surety bond to the Department equal to the estimated monthly supply of stamps or $2,500, whichever is greater. This applies to the Tribe and its licensed retailers. Second, the Tribe and its licensed retailers may purchase stamped cigarettes from wholesalers. Thus, "pre-collection" of Washington's cigarette tax by Indian retailers is not required.

B. THE STATE MAY ADOPT AND ENFORCE REASONABLE RULES AND REGULATIONS TO ENFORCE STATE EXCISE TAX COLLECTION RESPONSIBILITY ON SALES OF CIGARETTES AND GOODS BY THE TRIBES AND THEIR LICENSED RETAILERS TO NON-MEMBERS OF THE TRIBE.

[72]Br. App. 34a.

Against the foregoing background of enforcement considerations, *Moe* tells us:

> "* * * to the extent that the 'smoke shops' sell to those upon whom the State has validly imposed a sales or excise tax with respect to the article sold, the State may require the Indian proprietor simply to add the tax to the sales price and thereby aid the State's collection and enforcement thereof." *Moe, supra*, 425 U.S. at 483.

By adopting its record keeping and stamp requirements, this is all the State seeks to do. We know of no other meaningful way to *require* retailers to "add the tax to the sales price" other than to require the retailers to keep books and records documenting which sales are tax exempt and which are not; or, in the case of such a highly taxed item as cigarettes (which are easily concealed and highly mobile) to require stamps to be affixed prior to sale. Certainly, this Court, in approving the power of the state to require Indian retailers to collect the state's tax, must have intended to include reasonable requirements to assure that Indian retailers fulfill this requirement. To argue otherwise would vitiate completely the Court's holding in *Moe*. So long as the state requirements are reasonable, it follows that such requirements are applicable to Indian Tribes and their licensed retailers.

C. THE REQUIREMENT THAT INDIAN RETAILERS KEEP RECORDS PERTAINING TO BOTH INDIAN AND NON-INDIAN SALES IS A REASONABLE REQUIREMENT AND IS NOT PREEMPTED BY FEDERAL LAW.

The district court held that the state's record keeping requirements as set forth in ETB 504.08.192, constituted a burden on Indian retailers not authorized by federal law, citing *Warren Trading Post Co. v. Arizona Tax Commission*, 380 U.S. 685 (1965) (J.S. App. 29-30). In *Warren*, the Court struck down Arizona's attempt to tax the income of a federally-licensed Indian trader derived from on-reservation sale of goods to Indians. The Court

found that this tax would constitute a burden upon the trader or the Indians with whom he deals in violation of the purposes and policies of the Indian Traders Act, 25 U.S.C. §261 (1976), *et seq.*

The lower court's reliance upon *Warren* is misplaced. First, the state is not here attempting to impose a tax upon Indian seilers with respect to any sales. Rather, the state is merely requiring Indian retailers to keep a record of their sales to Indians as an adjunct of the state's power to require Indian retailers to collect and remit taxes on sales to non-Indians.[73] The district court found that nearly 90% of the Tribes' sales are to non-Indians. (J.S. App. 7)

In these circumstances, the state's requirement that tribally-licensed retailers keep records of sales to reservation Indians is truly a "minimal burden". *Moe, supra,* 425 U.S. at 483. Certainly, requiring Indian retailers to keep detailed records of ten percent of their sales is much less burdensome than requiring them to keep track of ninety percent of their sales. Furthermore, it is a requirement that is reasonably necessary to assure that non-Indians dealing with reservation retailers to not escape their obligations to pay state taxes imposed upon them. Where Indian Tribes and their licensed retailers establish a scheme primarily for the benefit of immunizing non-Indians from their obligations under state law, the burden of record keeping—even as applied to sales to Indians—is a reasonable one. The "burden" infringes upon no legitimate tribal interest and conflicts with no federal law.

[73]The necessity for this requirement can be illustrated as follows: Assume that an Indian retailer in a given audit period makes total sales in the amount of $500,000; $300,000 of which represent sales to non-Indians and $200,000 of which represent sales to Indians. The retailer in fact collects the state's sales tax on all sales to non-Indians. However, the retailer only reports $100,000 in sales to non-Indians, thus retaining $10,000 ($200,000 x 5 percent) in sales tax collected—claiming that he made $400,000 in sales to Indians. Without access to any records dealing with sales to Indians, the state's tax auditor will be unable to verify the accuracy of the Indian retailer's tax return. Thus, the state's sales tax becomes the Indian retailer's "profit margin" and violation of this Court's collection requirement will go virtually unchecked.

VI. ASSUMING THE STATE HAS THE AUTHORITY TO REQUIRE INDIAN TRIBES AND/OR THEIR LICENSED RETAILERS TO COLLECT AND REMIT TAXES ON THEIR SALES OF CIGARETTES TO NON-INDIANS, THE STATE MAY ENFORCE COLLECTION OF SUCH TAXES BY CONFISCATING AS CONTRABAND THOSE CIGARETTES WITHIN THE STATE WHICH ARE BEING SHIPPED IN INTERSTATE COMMERCE TO THE INDIAN TRIBE FOR ULTIMATE RESALE TO NON-MEMBERS OF THE TRIBE.

A. INTRODUCTION.

Another "enforcement issue" presented to the district court in both the *Colville* and *Yakima* cases involves the power of the State to seize contraband cigarettes. In view of the district court's holding that the State's tax, as applied to non-Indians, had been federally preempted, the court did not reach this issue. However, the issue was fully briefed and argued below, and there is no reason to delay resolution of this important issue. Accordingly, the State feels constrained to fully brief the issue before this court.

1. **The Statutory Scheme.** Under Washington law, unstamped cigarettes moving in interstate commerce consigned to a person in the state are contraband unless the consignee is an authorized purchaser. RCW 82.24.250 (Br. App. 25a). An Indian Tribe can be an authorized purchaser if it is authorized by the state Department of Revenue to possess unstamped cigarettes. RCW 82.24.250, *id.* However, an Indian Tribe will not be authorized by the state Department of Revenue to possess unstamped cigarettes where sales of unstamped cigarettes to persons who are not enrolled members of the Tribe are taking place within the exterior boundaries of the Tribe's reservation. RCW 82.24.040 (Br.App. 23a).

2. **Tribal Action.** Unstamped cigarettes and tobacco products are purchased by the Tribes from out-of-state wholesalers and are shipped directly to the Tribe by licensed, bonded interstate carriers. (*Colville*

Pre-trial Order, ¶2.5, A.32-33; *Yakima* Pre-trial Order, ¶5.7, A.172-173). None of the Tribes have sought authorization from the state to possess unstamped cigarettes. And it is undenied that sales of unstamped cigarettes to non-Indians are taking place on the Tribes' reservations.

Accordingly, under state law, cigarettes being shipped to the Tribes from out-of-state wholesalers, to the extent that they are intended for ultimate resale to non-members of the Tribe, are classified as contraband and are subject to seizure and sale. The issue, then, is whether the state, in the exercise of its police power in aid of the taxing power, has the authority to seize and sell unstamped cigarettes while still in transit as contraband in enforcement of its cigarette excise tax statutes.

B. THE STATE MAY CLASSIFY AS "CONTRABAND" UNSTAMPED CIGARETTES OWNED BY THE TRIBES AND INTENDED FOR ULTIMATE RESALE BY TRIBALLY-LICENSED RETAILERS TO NON-MEMBERS OF THE TRIBE, AND MAY SEIZE AND SELL SUCH CIGARETTES WHEN SUCH CIGARETTES ARE IN TRANSIT IN INTERSTATE COMMERCE.

At the outset, it is important to state what this issue does *not* involve. First, there is no claim that the seizure of unstamped cigarettes moving in interstate commerce destined for the Tribes for ultimate resale to non-members of the Tribe exceeds state statutory authority. Second, there is no claim that the procedures used by the state in seizing and selling unstamped cigarettes violates the due process clause of the United States Constitution. *See Phillips v. Comm'r of Internal Revenue*, 283 U.S. 589 (1931).[74]

[74]These very same statutes have been upheld against a challenge under the Due Process Clause in *Matheson v. Kinnear*, 393 F.Supp. 1025 (W.D. Wash. 1975). That case involved seizure of unstamped cigarettes being sold by an Indian on trust land located outside the boundaries of an Indian reservation. The three-judge court in *Matheson* was comprised of the same members as in the instant case.

We turn now to the question of the state's power, in the exercise of its police power in aid of the taxing power, to classify as contraband and seize and sell unstamped cigarettes moving in interstate commerce to aid the enforcement of its cigarette excise tax statutes. The lower courts have uniformly upheld a state's power to seize cigarettes as contraband even though in the course of interstate commerce when the cigarettes are within the state contrary to state cigarette tax statutes. *State v. Sedacca*, 252 Md. 207, 249 A.2d 456 (1969); *Angelica Co. v. Goodman*, 52 Misc.2d 844, 276 N.Y.Supp.2d 766 (Sup. Ct. 1966); *People v. Asta*, 337 Mich. 590, 60 N.W.2d 472 (1953); *Commonwealth v. Flickinger*, 165 Pa. Super. 95, 67 A.2d 779 (1949), *aff'd*, 365 Pa. 59, 73 A.2d 652, (1950), *cert. denied, sub nom. Flickinger v. Commonwealth*, 340 U.S. 843 (1950); *People v. Locricchio*, 342 Mich. 210, 69 N.W.2d 723 (1955).

These cases are nothing more than an application of the general rule that states, in order to safeguard vital local interests, will be permitted to regulate interstate commerce if it does not unduly interfere with that commerce and is not in conflict with an area of regulation totally preempted by congress. As stated in *Freeman v. Hewit*, 329 U.S. 249 (1946):

> "* * * [I]n the necessary accommodation between local needs and the overriding requirement of freedom for the national commerce, the incidence of a particular type of State action may throw the balance in support of the local need because interference with the national interest is remote or unsubstantial. A police regulation of local aspects of interstate commerce is a power often essential to a State in safeguarding vital local interests. At least until Congress chooses to enact a nation-wide rule, the power will not be denied to the State." 329 U.S. at 253.

Here, it is clear that the state has a vital interest in preventing the diversion of untaxed cigarettes into the hands of its non-Indian citizens. Cigarettes are highly mobile, easily concealable, and — most importantly — highly taxed. In these respects, cigarettes are identical to intoxicating liquor. And this Court, in *Carter v. Commonwealth of Virginia*, 321 U.S. 131 (1944), has held that the Commerce Clause does not prohibit a state from requiring a carrier transporting intoxicating liquor to: (1) use the most direct route and have in its possession a bill of lading showing the route to be used; (2) post a bond; (3) have in its possession a bill of lading showing the name of the true consignee and also showing that *the consignee had a legal right to receive the intoxicating liquor at the stated destination.*

Washington statutes declaring unstamped cigarettes as contraband and providing for seizure and sale thereof, are clearly aimed at preventing tax evasion. The statutes do not prohibit cigarettes from being brought across the state line, but rather establish a procedure to insure that unstamped cigarettes are not diverted into the hands of non-Indians. Any effect upon interstate commerce which might possibly result from this scheme is merely incidental to the valid exercise of the police power of the state of Washington. To hold that Washington's contraband procedures violate the Commerce Clause would be to permit the wholesale avoidance of legally imposed taxes. This Court did not sanction that result in *Moe, supra*, and there is no reason for the Court to sanction that result here.

VII. A STATE MAY LAWFULLY SEIZE AND LEVY UPON PROPERTY OF INDIAN TRIBES TO ENFORCE COLLECTION RESPONSIBILITY FOR STATE TAXES IMPOSED AGAINST NON-INDIAN PURCHASERS.

A. INTRODUCTION.

This issue presents a slightly different problem from

the interstate commerce clause issue discussed in Part VI of the Argument portion of this brief. The state is here seeking to enter upon the Tribes' reservations and in the exercise of its police power in aid of the taxing power seize and sell so much of the Tribes' and/or the retailers' stocks of cigarettes which are intended for resale to non-members of the Tribe at locations on trust or restricted status land within the exterior boundaries of the reservation. This issue raises the question of the scope and extent of state police power over the Tribe and its members conducting activities with non-Indians on the reservation. The issue is present in both the *Colville* and *Yakima* cases.

B. The State Enforcement Scheme.

(1) **Cigarette tax.** Unstamped cigarettes within the state, except those cigarettes being transported to Indian Tribes for resale to members of the Tribe, are declared contraband and are subject to seizure and sale. RCW 82.24.130. (Br. App. 24a)[75] Thus, to the extent that the Tribes' licensed retailers sell unstamped cigarettes to non-Indians, that portion of the stock of goods intended for sale is contraband and subject to seizure and sale under state law.

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[75]The statutory pattern is contained in RCW 82.24.130 and RCW 82.24.250, quoted in pertinent part as follows:

(RCW 82.24.130)

"Subject to the provisions of RCW 82.24.250, any articles taxed herein found at any point within this state, which articles shall be held, owned, or possessed by any person, and not having the stamps affixed to the packages or containers are hereby declared to be contraband goods, and may be seized by the department of revenue, or its duly authorized agent, or by any peace officer of the state, when directed by the department of revenue so to do, without a warrant, and said goods shall be offered by the department of revenue for sale at public auction to the highest bidder * * * ."

RCW 82.24.250 permits unstamped cigarettes to be transported to "a person who is authorized by chapter 82.24 RCW to possess unstamped cigarettes in this state." That term includes "* * * any Indian tribal organization authorized to possess unstamped cigarettes." RCW 82.24.250. An Indian Tribe is not authorized to possess unstamped cigarettes "* * * when it appears that sales of unstamped cigarettes

2. **Sales tax.** The situation with respect to enforcement of the state's sales tax (chapter 82.08 RCW) is different. State law does not provide for seizure and sale of property as "contraband" where a seller either does not collect the tax or, once having collected the tax, fails to turn it over to the state. The remedy provided in state law for a person who collects the tax but fails to turn it over to the state is criminal: conviction for a gross misdemeanor. RCW 82.08.050 (Br. App. 19a). The remedy for failure to collect the tax is to assess the tax, in the state's discretion, against either the buyer or seller. RCW 82.08.050. But in the latter case, enforcing the tax against the seller is not taxing the seller, but rather is another exercise of the police power in aid of the taxing power. *See, Morrow v. Henneford,* 182 Wash. 625, 47 P.2d 1016 (1935); *Rainier National Park Co. v. Martin,* 18 F.Supp. 481 (W.D. Wash. 1937), *on rehearing,* 23 F.Supp. 60 (1937), *aff'd,* 302 U.S. 661 (1938); *Sherman-Reynolds, Inc. v. Mahin,* 47 Ill.2d 323, 265 N.E.2d 640 (1970).

C. THE STATE MAY CLASSIFY AS "CONTRABAND" UNSTAMPED CIGARETTES OWNED BY THE TRIBES AND/OR THEIR RETAILERS AND INTENDED FOR ULTIMATE RESALE TO NON-MEMBERS OF THE TRIBE IN VIOLATION OF STATE LAW, AND MAY SEIZE AND SELL SUCH CIGARETTES IN THE MANNER PRESCRIBED BY STATE LAW WHERE SUCH CIGARETTES ARE HELD ON THE TRIBES' INDIAN RESERVATIONS.

First, it is clear that an Indian reservation is within the territorial jurisdiction of the state in which it is located and its residents (Indians and non-Indians) are citizens and residents of the state in which the reservation is

to persons who are not enrolled members of a recognized Indian tribe are taking place, or have taken place, within the exterior boundaries of the reservation occupied by that tribe." RCW 82.24.040.

located. *Organized Village of Kake v. Egan,* 369 U.S. 60 (1962).

The general rule with respect to state police power jurisdiction over Indian reservations is summarized in F. Cohen, FEDERAL INDIAN LAW, 117 (1942) as follows:

> "Thus, without questioning the constitutional doctrine that states possess original and complete sovereignty over their own territories save insofar as such sovereignty is limited by the Federal Constitution, a sense of realism must compel the conclusion that control of Indian affairs has been delegated, under the Constitution, to the Federal Government and that state jurisdiction in any matters affecting Indians can be upheld only if one of two conditions is met: either that Congress has expressly delegated back to the state, or recognizes in the state, some power of government respecting Indians; or that a question involving Indians involves non-Indians to a degree which calls into play the jurisdiction of a state government."

In *Moe,* this Court found that the state of Montana had jurisdiction over tribal retailers selling cigarettes to non-Indians for purposes of enforcing a collection responsibility with respect to taxes imposed on non-Indians. The Court found that this exercise of state jurisdiction did not conflict with federal law and did not frustrate tribal self-government. *Moe,* 425 U.S. at 483. The basis of the Court's holding was its perception that the Tribe and its enrolled members were involved with non-Indians to a degree which permitted the state to extend its police power onto the reservation.[76]

[76]An examination of the lower court's opinion in *Moe* clearly reveals the jurisdictional basis by which the state may exercise jurisdiction over reservation Indians. Analyzing the facts before it, the court stated, 392 F.Supp. 1297, 1311:

> "It may reasonably be inferred that the stores were not established primarily for the benefit of Indian customers residing on the Reservation, but rather to sell cigarettes to prospective customers passing on the highway and others who come from neighboring communities to purchase cigarettes at a price substantially lower than the going price off the Reservation. The Indian seller profits from increased sales. The non-Indian purchasers avoid the

Thus, fairly read, *Moe* stands for the proposition that where reservation Indians establish businesses within Indian country primarily to attract the business patronage of non-Indians, the effect of which is to encourage, aid, and abet non-Indians in avoiding state tax laws, the state may exercise its police power jurisdiction over reservation Indians to the degree necessary to prevent such wholesale violations.

To the extent that this results in subjecting reservation Indians to state court jurisdiction, it nevertheless does not interfere with "the right of tribal self-government" as articulated in *Williams v. Lee*, 358 U.S. 217 (1959). Although the Tribes do have a legitimate interest in protecting their members and their property from arbitrary confiscation and preserving the public peace on the reservation, this right is not absolute. Tribes have no legitimate governmental interest in aiding and abetting their members to induce non-Indians to violate state law. However unpalatable it may be to the Tribes and their licensed retailers, the clear import of *Moe* dictates that when the Tribes invite Washington's non-Indian citizens onto the reservation in this manner, they also invite the jurisdiction of the state, at least insofar as it is reasonably necessary to prevent wholesale violations of state law by non-Indian citizens.

Finally, it may very well be that this Court will find it unnecessary to rule on this aspect of the appeal. Hopefully, a mere declaration by this Court that the Tribes and their licensed retailers are required to collect and remit cigarette excise taxes and sales taxes imposed on non-members of the Tribe will be sufficient to cause compliance with the state's requirements and thereby obviate the necessity for more vigorous state enforcement.

payment of a tax legally imposed upon them.

"We conclude that under these facts the Indian seller in selling cigarettes to non-Indians is involved with non-Indians to a degree which would permit the State of Montana to require precollection of the tax imposed upon the non-Indians."

This was the approach taken by the district court. *See* J.S. App. 55, n. 8.

VIII. A STATE MAY IMPOSE AN EXCISE TAX ON THE PRIVILEGE OF USING A MOTOR VEHICLE WITH RESPECT TO MOTOR VEHICLES, TRAVEL TRAILERS AND CAMPERS OWNED BY AN INDIAN TRIBE OR ITS ENROLLED MEMBERS RESIDING UPON THE RESERVATION, WHERE THE MOTOR VEHICLES ARE USED PARTLY ON AND PARTLY OFF THE RESERVATION.

In objecting to payment of Washington state motor vehicle excise taxes the appellant Indians in *Colville* (and only in *Colville*) are claiming a "free ride" for their vehicles on the public highways throughout the State. They certainly have a right to this free ride so long as those vehicles remain within their respective reservations.[77] The question here is whether they have a like right everywhere else in the state.[78]

A. THE STATE'S MOTOR VEHICLE EXCISE TAX SCHEME.

To put this question in perspective it may be helpful to review Washington's system of taxes and fees for motor vehicles. That system might best be shown through the example of an ordinary purchase of a new automobile by an ordinary Washington resident.

1. The Retail Sales Tax.

If the purchaser buys his new automobile within the state he must, of course, pay the retail sales tax—which is applicable to retail sales of almost all types of tangible personal property. See chapter 82.08 RCW. If, however, he

[77]We conceded in the district court that the excise taxes here involved cannot, under *McClanahan* and *Moe*, be applied to vehicles which are owned by reservation Indians (or a Tribe) and which never leave the reservation. (J.S. App. 42)

[78]As we shall see shortly, the ride is not entirely free, as the Indians themselves will admit.

purchases the same automobile in Portland, Oregon, the sales tax is not applicable even though he may immediately bring his new automobile into Washington because the "tax event" (*i.e.*, the retail sale) in that case is beyond the reach of Washington's jurisdiction.[79]

2. **The Use Tax.**

The *use* of that automobile, on the other hand, is not beyond Washington's reach. Accordingly, a state use tax will be due and payable when the car is brought into the state with the same rate and the same tax base as the retail sales tax. *See Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937), and chapter 82.12 RCW. This is so because for the use tax, the "tax event" is not the sale of the property but, rather, it is (in the terms of the statute itself) "the privilege of using within this state as a consumer any article of tangible personal property purchased at retail. * * *" RCW 82.12.020.[80]

3. **Licensing and Registration Fees.**

In addition, if the automobile is to be driven on a public highway it must have a license. RCW 46.16.010.[81] And there is a fee for that license; $13.40 for the initial license and $9.40 for each annual renewal. RCW 46.16.060.

[79]By "tax event" we mean the legal incidence of the tax; *i.e.*, the activity, occurrence, privilege, or other legal relationship upon which the tax is imposed. We use the term "tax event" because that is the term used by the District Court in *Moe*. See pp. 113-114, *infra*.

[80]One further feature of both the sales tax and the use tax should also be noted. The applicability of either tax in no way depends upon whether the automobile is used on a public highway. If it is used simply to drive around on a farm, or even if it just sits in a garage, one or the other of the two taxes will apply.

[81]RCW 46.16.010 (Br. App. 32a) reads, in pertinent part, as follows:

"It shall be unlawful for a person to operate any vehicle over and along a public highway of this state without first having obtained and having in full force and effect a current and proper vehicle license and display vehicle license number plates therefor as by this chapter provided: * * *"

4. **Motor Vehicle Excise Tax.**

This tax, which is the one at issue in this case, might best be described as an annual use tax. In the language of RCW 82.44.020 (the statute imposing the tax):

> "An excise tax is imposed for the privilege of using in the state any motor vehicle. * * * The annual amount of such excise shall be two percent of the fair market value of such vehicle. * * *" (Br. App. 27a)

Under this provision the reach of the motor vehicle excise tax would appear to be as broad as the general use tax. The tax would thus seemingly apply even if the automobile was never used on the public highways. Actually, however, its reach is somewhat narrower—for RCW 82.44.060 provides that:

> "The excise tax hereby imposed shall be due and payable * * * at the time of registration of a motor vehicle." *(Id.)*

And registration or licensing, as we have seen, is necessary only when the automobile is to be used on a public highway. Thus, if a vehicle is not so used—and therefore does not have to be registered and licensed—no excise tax is "due and payable".

B. **THE COLVILLE CHALLLENGE.**

Notably, *it is only the motor vehicle excise tax which the Indians in* Colville *are challenging.* They contend (unlike the Indians in *Yakima*) that they are immune from the motor vehicle excise tax *even with respect to motor vehicles which are used on public highways outside the reservation.*[82] Yet, as in *Moe*, the Indians make no contention that they are immune from payment of the $9.40 (or $13.40) licensing fee—for good reason. Without paying that fee they cannot obtain the licenses without which (and without the display of which) the operation of their vehicles on those same public highways is unlawful; RCW 46.16.010, *supra*. As above indicated, however, the

[82]They likewise claim, of course, with respect to the travel trailer and camper excise taxes.

incidence of the license fee and excise tax is the same, even though only the license is needed in order to avoid being cited or arrested by the state highway patrol.

The point, simply stated, is this: If the tax event takes place within the reservation and the taxpayer is an Indian, the state cannot reach it. *McClanahan, supra.* But if the tax event takes place off the reservation, the state can reach it. *Mescalero, supra.* And when an Indian-owned vehicle comes off the reservation the tax event under the motor vehicle excise tax likewise takes place off the reservation—and the state can reach it, just as with the use tax and the license fee.

The Indians, however, contend that *Moe* requires a different result. The district court agreed—but only because it confused what is really very simple. This confusion is best shown in the following excerpt from the District Court's opinion:

> "Although there is no doubt that *Mescalero* would control if this issue involved use exclusively off the reservation, we do not agree that *Moe* is not controlling on the facts presented here. A review of the District Court's decision in *Moe* reveals that *the vehicle use there taxed* was partly on and partly off the Flathead Reservation. *Confederated Salish & Kootenai Tribes v. Montana,* 392 F.Supp. 1325, 1328-29 (D. Mont. 1975), aff'd, 425 U.S. 463 (1976), (Smith, J., concurring and dissenting). Moreover, the Montana tax invalidated in *Moe* was, except for labeling, identical in operation and effect to the tax here imposed." (Emphasis supplied) (J.S. App. 42)

This review of the District Court decision in *Moe,* however, was not careful enough. A more careful review would have shown that in *Moe,* Montana was not taxing "vehicle use" at all. The district court opinion in *Moe* tells us, with exact accuracy, what Montana was taxing. In striking down both the Montana cigarette tax on sales to Indians, and the Montana personal property tax on Indian-owned vehicles, that court stated:

"The *'tax event'*, i.e., the sale of cigarettes *or the*

> *ownership of a motor vehicle as of January 1 of each year* (R.C.M. 1947, § 84-406(2) (1974 Supp.)) in both cases *occurs on the reservation. Moe* and *McClanahan* are therefore controlling and require this court to grant summary judgment in favor of the plaintiffs." 392 F.Supp. at 1327. (Emphasis supplied)

The single tax event in that case (*i.e.*, the ownership of the motor vehicle as of January 1 of each year) thus took place on the reservation. As is typical with property taxes, the tax event took place on a certain single day, and in a certain single place. Because that tax event took place only on the reservation, *McClanahan* required that the vehicles be immune from the tax.

Under the Washington motor vehicle excise tax, however, this is not the case. It is an excise tax (even though measured by the value of the vehicle) and not a property tax. As the Washington State Supreme Court said in so ruling in *State ex rel. Hansen v. Salter,* 190 Wash. 703, 70 P.2d 1056 (1937),

> "* * * It is urged that the exaction is a property tax—not an excise—and therefore denies 'equal protection of the laws' guaranteed by the fourteenth amendment of the constitution of the United States, and the demands of equality and uniformity in taxation under the fourteenth amendment to the state constitution. That a tax upon the use of personal property is an excise, is no longer open to question in this state. *Morrow v. Henneford,* 182 Wash. 625, 47 P. (2d) 1016; *Vancouver Oil Co. v. Henneford,* 183 Wash. 317, 49 P. (2d) 14; *Henneford v. Silas Mason Co.,* 300 U.S. 577, 57 S.Ct. 524. Being an excise, the tax is not objectionable upon the grounds suggested. * * *"[83] 190 Wash. at 705, 70 P.2d at 1056-57.

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[83]As stated by this Court in *Gurley v. Rhoden,* 421 U.S. 200 (1975), quoting from *American Oil Co. v. Neill,* 380 U.S. 451, 455 (1965):

> "When a state court has made its own definitive determination as to the operating incidence [of a state tax], our task is simplified. We give this finding great weight in determining the natural effect of a statute, and if it is consistent with the statute's reasonable interpretation it will be deemed conclusive." 421 U.S. at 208.

Thus, only so long as the vehicle stays on the reservation does the tax event exclusively occur on the reservation. But when the vehicle comes off the reservation the tax event correspondingly occurs off the reservation. In contrast to the Montana property tax, under the motor vehicle excise tax the tax event constantly trails along with the vehicle itself. And *Mescalero* thus requires that this off-reservation use of the vehicle not be immune from the tax.

Finally, this same confusion of the District Court below is also shown by its discussion of the necessity to "disregard labels" and its emphasis on the similarity in "practical operation" between the Montana property tax and the Washington motor vehicle excise tax (J.S. App. 43).

To illustrate: The typical sales tax and a use tax are, in "practical operation," often identical. An identical rate is applied to an identical base with respect to identical sorts of property. Only the tax event or incidence of the tax is different. But this difference is the precise reason why a sales tax will be struck down while a use tax will be upheld. Compare *McLeod v. Dilworth Co.*, 322 U.S. 327 (1944), and *General Trading Co. v. State Tax Comm'n*, 322 U.S. 335 (1944). One might label the difference as just a difference of "labels"; but however labelled, the difference is crucial, not only in the sales-use tax area, but in this area also. It is crucial with respect to property crossing an interstate boundary—and with respect to property crossing a reservation boundary as well.

CONCLUSION

The State submits that the decision of the district court is directly contrary to this Court's decision in *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976). If allowed to stand, the decision would leave the continued viability of *Moe* to the whim of each Indian Tribe. Furthermore, the decision below elevates Indian Tribes to the position of sovereign nations, with full

governmental power over non-Indians, a concept which has been rejected by this Court throughout its history.

Indian Tribes, as a matter of inherent tribal sovereignty or by delegation from the federal government, have no power to oust the state of its legitimate right to tax its own non-Indian citizens. Even assuming that the Tribe has the right to tax non-Indians with respect to on-reservation transactions with reservation Indians, the exercise of that power does not vitiate a state tax on the non-Indian. The impact of the state's tax upon the self-governing ability of the Tribe is remote and indirect — if it exists at all. To the extent that it results in Indian Tribes being unable to market a tax exemption, the state's tax nevertheless interferes with no legitimate tribal governmental right.

The Tribes and their licensed retailers have involved themselves with non-Indians in the State of Washington to a degree which clearly calls for the exercise of state power in order that wholesale violations of state law by non-Indians do not go unchecked. The Tribes ought not be allowed to hide behind illusory delegations of federal power or discarded notions of tribal sovereignty. Furthermore, the executive branch of the United States government, in its rush to foster tribal economic development, ought not be allowed to serve as an "aider and abettor", unaided by clear congressional direction, of these very same wholesale violations of state law.

On the other hand, this Court should recognize that the State of Washington has a legitimate interest in protecting its treasury. The rules and regulations adopted by the state to enforce cigarette and sales tax collection responsibility are reasonable, and there is no reason why the state should not be permitted to apply them to the Tribes and/or their licensed retailers.

Accordingly, the State requests this Court to reverse the decision of the district court and hold that the state may require the Tribes to collect the state's cigarette and sales taxes imposed upon non-members of the tribe in the manner prescribed by state law.

In the *Colville* case, the Court should dissolve those portions of the injunction entered by the district court preventing the state from imposing and enforcing its sales and cigarette taxes with respect to sales to non-members of the tribe; and imposing and enforcing its motor vehicle, travel trailer and camper excise taxes upon the tribes or their reservation resident members with respect to vehicles used partly on or partly off the reservation.

In the *Yakima* case, the Court should dissolve the injunction of the district court to the extent that it prohibits the state from imposing and enforcing its cigarette and sales taxes upon sales by the tribally-licensed retailers to non-Indians.

This Court should remand the case to the district court for further proceedings consistent with this Court's opinion.

DATED this 4th day of May, 1979.

Respectfully submitted,

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APPENDIX A

U.S. Constitutional Provisions:

U.S. CONST., Art. I, §8, cl. 3:

"The Congress shall have Power * * *
To regulate Commerce with foreign Nations and among the several States, and with the Indian Tribes;"

U.S. CONST., Art. VI, cl. 2:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

U.S. CONST., Amendment XIV, §1:

"* * * No State shall make or enforce any law which shall * * * deny to any person within its jurisdiction the equal protection of the laws."

APPENDIX B

Treaty with the Dwamish &c. Indians (Lummi), Jan. 22, 1855, 12 Stat. 927, Art. II:

"ARTICLE II. There is, however, reserved for the present use and occupation of the said tribes and bands the following tracts of land, viz: the amount of two sections, or twelve hundred and eighty acres, surrounding the small bight at the head of Port Madison, called by the Indians Noo-sohk-um; the amount of two sections, or twelve hundred and eighty acres, on the north side Hwhomish Bay and the creek emptying into the same

called Kwilt-seh-da, the peninsula at the southeastern end of Perry's Island called Shäis-quihl, and the island called Chah-choo-sen, situated in the Lummi River at the point of separation of the mouths emptying respectively into Bellingham Bay and the Gulf of Georgia. All which tracts shall be set apart, and so far as necessary surveyed and marked out for their exclusive use; nor shall any white man be permitted to reside upon the same without permission of the said tribes or bands, and of the superintendent or agent, but, if necessary for the public convenience, roads may be run through the said reserves, the Indians being compensated for any damage thereby done them."

APPENDIX C

Treaty with the Makah Tribe, Jan. 31, 1855, 12 Stat. 939, Art. II:

"ARTICLE II. There is, however, reserved for the present use and occupation of the said tribe the following tract of land, viz: Commencing on the beach at the mouth of a small brook running into Neah Bay next to the site of the old Spanish fort; thence along the shore round Cape Classett or Flattery, to the mouth of another small stream running into the bay on the south side of said cape, a little above the Waatch village; thence following said brook to its source; thence in a straight line to the source of the first-mentioned brook, and thence following the same down to the place of beginning; which said tract shall be set apart, and so far as necessary surveyed and marked out for their exclusive use; nor shall any white man be permitted to reside upon the same without permission of the said tribe and of the superintendent or agent; but if necessary for the public convenience, roads may be run through the said reservation, the Indians being compensated for any damage thereby done them. It is, however, understood that should the President of the United States hereafter see fit to place upon the said reservation any other friendly tribe or band to occupy the same in common with those above mentioned, he shall be at liberty to do so."

APPENDIX D

Treaty with the Yakamas, June 9, 1855, 12 Stat. 951, Art. II:

"ARTICLE II. There is, however, reserved, from the lands above ceded for the use and occupation of the aforesaid confederated tribes and bands of Indians, the tract of land included within the following boundaries, to wit:

Commencing on the Yakama River, at the mouth of the Attah-nam River; thence westerly along said Attah-nam River to the forks; thence along the southern tributary to the Cascade Mountains; thence southerly along the main ridge of said mountains, passing south and east of Mount Adams, to the spur whence flows the waters of the Klickatat and Pisco rivers; thence down said spur to the divide between the waters of said rivers; thence along said divide to the divide separating the waters of the Satass River from those flowing into the Columbia River; thence along said divide to the main Yakama, eight miles below the mouth of the Satass River; and thence up the Yakama River to the place of beginning.

All of which tract shall be set apart, and, so far as necessary, surveyed and marked out, for the exclusive use and benefit of said confederated tribes and bands of Indians, as an Indian reservation; nor shall any white man, excepting those in the employment of the Indian Department, be permitted to reside upon the said

reservation without permission of the tribe and the superintendent and agent. And the said confederated tribes and bands agree to remove to, and settle upon, the same, within one year after the ratification of this treaty. In the mean time it shall be lawful for them to reside upon any ground not in the actual claim and occupation of citizens of the United States; and upon any ground claimed or occupied, if with the permission of the owner or claimant.

Guaranteeing, however, the right to all citizens of the United States, to enter upon and occupy as settlers any lands not actually occupied and cultivated by said Indians at this time, and not included in the reservation above named.

And provided, That any substantial improvements heretofore made by any Indian, such as fields enclosed and cultivated, and houses erected upon the lands hereby ceded, and which he may be compelled to abandon in consequence of this treaty, shall be valued, under the direction of the President of the United States, and payment made therefor in money; or improvements of an equal value made for said Indian upon the reservation. And no Indian will be required to abandon the improvements aforesaid, now occupied by him, until their value in money, or improvements of an equal value shall be furnished him as aforesaid."

APPENDIX E

EXECUTIVE ORDER of July 2, 1872 (Colville reservation):

EXECUTIVE MANSION, *Washington, July 2, 1872.*

It is hereby ordered that the tract of country referred to in the within letter of the Commissioner of Indian Affairs as having been set apart for the Indians therein

named by Executive order of April 9, 1872, be restored to the public domain, and that in lieu thereof the country bounded on the east and south by the Columbia River, on the west by the Okanagan River, and on the north by the British possessions, be, and the same is hereby, set apart as a reservation for said Indians, and for such other Indians as the Department of the Interior may see fit to locate thereon.

U. S. GRANT.

APPENDIX F

WASHINGTON ENABLING ACT, 25 Stat. 676, ch. 180, §4 (1889):

"SEC. 4. That the delegates to the conventions elected as provided for in this act shall meet at the seat of government of each of said Territories, except the delegates elected in South Dakota, who shall meet at the city of Sioux Falls, on the fourth day of July, eighteen hundred and eighty-nine, and, after organization, shall declare, on behalf of the people of said proposed States, that they adopt the Constitution of the United States; whereupon the said conventions shall be, and are hereby, authorized to form constitutions and States governments for said proposed states, respectively. The constitutions shall be republican in form, and make no distinction in civil or political rights on account of race or color, except as to Indians not taxed, and not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence. And said conventions shall provide, by ordinances irrevocable without the consent of the United States and the people of said States:

* * *

Second. That the people inhabiting said proposed

States do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States; that the lands belonging to citizens of the United States residing without the said States shall never be taxed at a higher rate than the lands belonging to residents thereof; that no taxes shall be imposed by the States on lands or property therein belonging to or which may hereafter be purchased by the United States or reserved for its use. But nothing herein, or in the ordinances herein provided for, shall preclude the said States from taxing as other lands are taxed any lands owned or held by any Indian who has severed his tribal relations, and has obtained from the United States or from any person a title thereto by patent or other grant, save and except such lands as have been or may be granted to any Indian or Indians under any act of Congress containing a provision exempting the lands thus granted from taxation; but said ordinances shall provide that all such lands shall be exempt from taxation by said States so long and to such extent as such act of Congress may prescribe.

APPENDIX G

Public Law 83-280, 67 Stat. 588, ch. 505 (1953).

To confer jurisdiction on the States of California, Minnesota, Nebraska, Oregon, and Wisconsin, with respect to criminal offenses and civil causes of action committed or arising on Indian reservations within such States, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That chapter 53 of title 18, United States Code, is hereby amended by inserting at the end of the chapter analysis preceding section 1151 of such title the following new item:

"1162. State jurisdiction over offenses committed by or against Indians in the Indian country."

Sec. 2. Title 18, United States Code, is hereby amended by inserting in chapter 53 thereof immediately after section 1161 a new section, to be designated as section 1162, as follows:

"§1162. State jurisdiction over offenses committed by or against Indians in the Indian country.

"(a) Each of the States listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over offenses committed elsewhere within the State, and the criminal laws of such State, shall have the same force and effect within such Indian country as they have elsewhere within the State:

"State of	Indian Country Affected
California	All Indian country within the State
Minnesota	All Indian country within the State, except the Red Lake Reservation
Nebraska	All Indian country within the State
Oregon	All Indian country within the State, except the Warm Springs Reservation
Wisconsin	All Indian country within the State, except the Menominee Reservation

"(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize

regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

"(c) The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section."

Sec. 3. Chapter 85 of Title 28, United States Code, is hereby amended by inserting at the end of the chapter analysis preceding section 1331 of such title the following new item:

"1360. State civil jurisdiction in actions to which Indians are parties."

Sec. 4. Title 28, United States Code, is hereby amended by inserting in chapter 85 thereof immediately after section 1359 a new section, to be designated as section 1360, as follows:

"§1360. State civil jurisdiction in action to which Indians are parties.

"(a) Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State:

"State of	Indian Country Affected
California	All Indian country within the State
Minnesota	All Indian country within the State, except the Red Lake Reservation
Nebraska	All Indian country within the State

Oregon	All Indian country within the State, except the Warm Springs Reservation
Wisconsin	All Indian country within the State, except the Menominee Reservation

"(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

"(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section."

Sec. 5. Section 1 of the Act of October 5, 1949 (63 Stat. 705, ch. 604), is hereby repealed, but such repeal shall not affect any proceedings heretofore instituted under that section.

Sec. 6. Notwithstanding the provisions of any Enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their state constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act: *Provided*, That the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their state constitution or statutes as the case may be.

Sec. 7. The consent of the United States is hereby given to any other State not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both, as provided for in this Act, to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof.

Approved August 15, 1953.

APPENDIX H

Public Law 83-280, 67 Stat. 588, ch. 505, §2 (1953), *as amended,* codified at 18 U.S.C. §1162 (1976):

§ 1162. State jurisdiction over offenses committed by or against Indians in the Indian country

(a) Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

State or Territory of	*Indian country affected*
Alaska	All Indian country within the State, except that on Annette Islands, the Metlakatla Indian community may exercise jurisdiction over offenses committed by Indians in the same manner in which such jurisdiction may be exercised by Indian tribes in Indian country over which the State jurisdiction has not been extended.
California	All Indian country within the State
Minnesota	All Indian country within the State, except the Red Lake Reservation
Nebraska	All Indian country within the State
Oregon	All Indian country within the State, except the Warm Springs Reservation
Wisconsin	All Indian country within the State

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

(c) The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section as areas over which the several States have exclusive jurisdiction.

APPENDIX I

Public Law 83-280, 67 Stat. 588, ch. 505, §4 (1953), *as amended,* codified at 28 U.S.C. §1360 (1976):

"§ 1360. State civil jurisdiction in actions to which Indians are parties

(a) Each of the States or Territories listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over other civil causes of action, and those civil laws of such State or Territory that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

State or Territory of	*Indian country affected*
Alaska	All Indian country within the Territory
California	All Indian country within the State
Minnesota	All Indian country within the State, except the Red Lake Reservation
Nebraska	All Indian country within the State
Oregon	All Indian country within the State, except the Warm Springs Reservation
Wisconsin	All Indian country within the State

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section.

APPENDIX J

Public Law 90-284, Title IV, 82 Stat. 78, codified at 25 U.S.C. §§1321-1326 (1976):

§1321

(a) The consent of the United States is hereby given to any State not having jurisdiction over criminal offenses committed by or against Indians in the areas of Indian country situated within such State to assume, with the consent of the Indian tribe occupying the particular Indian country or part thereof which could be affected by such assumption, such measure of jurisdiction over any or all of such offenses committed within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over any such offense committed elsewhere within the State, and the criminal laws of such State shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State.

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band,

or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

§1322

(a) The consent of the United States is hereby given to any State not having jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country situated within such State to assume, with the consent of the tribe occupying the particular Indian country or part thereof which would be affected by such assumption, such measure of jurisdiction over any or all such civil causes of action arising within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State.

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute, or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section.

§1323

(a) The United States is authorized to accept a retrocession by any State of all or any measure of the criminal or civil jurisdiction, or both, acquired by such State pursuant to the provisions of section 1162 of Title 18, section 1360 of Title 28, or section 7 of the Act of August 15, 1953 (67 Stat. 588), as it was in effect prior to its repeal by subsection (b) of this section.

(b) Section 7 of the Act of August 15, 1953 (67 Stat. 588), is hereby repealed, but such repeal shall not affect any cession of jurisdiction made pursuant to such section prior to its repeal.

§1324

Notwithstanding the provisions of any enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil or criminal jurisdiction in accordance with the provisions of this subchapter. The provisions of this subchapter shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes, as the case may be.

§1325

(a) No action or proceeding pending before any court or agency of the United States immediately prior to any cession of jurisdiction by the United States pursuant to this subchapter shall abate by reason of that cession. For the purposes of any such action or proceeding, such cession shall take effect on the day following the date of final determination of such action or proceeding.

(b) No cession made by the United States under this subchapter shall deprive any court of the United States of jurisdiction to hear, determine, render judgment, or impose sentence in any criminal action instituted against any person for any offense

committed before the effective date of such cession, if the offense charged in such action was cognizable under any law of the United States at the time of the commission of such offense. For the purpose of any such criminal action, such cession shall take effect on the day following the date of final determination of such action.

§1326

State jurisdiction acquired pursuant to this subchapter with respect to criminal offenses or civil causes of action, or with respect to both, shall be applicable in Indian country only where the enrolled Indians within the affected area of such Indian country accept such jurisdiction by a majority vote of the adult Indians voting at a special election held for that purpose. The Secretary of the Interior shall call such special election under such rules and regulations as he may prescribe, when requested to do so by the tribal council or other governing body, or by 20 per centum of such enrolled adults.

APPENDIX K

28 U.S.C. §1253 (1976):

§ 1253. Direct appeals from decisions of three-judge courts

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

APPENDIX L

28 U.S.C. §2101(b) (1976):

§ 2101. Supreme Court; time for appeal or certiorari; docketing; stay

* * *

(b) Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceeding, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final.

APPENDIX M

FED. R. CIV. P. 59(a) & (b):

(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(b) Time for Motion. A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

APPENDIX N

WASH. CONST., Art. XXVI, §2:

The following ordinance shall be irrevocable without the consent of the United States and the people of this state:

* * *

Second. That the people inhabiting this state do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries of this state, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States and that the lands belonging to citizens of the United States residing without the limits of this state shall never be taxed at a higher rate than the lands belonging to residents thereof; and that no taxes shall be imposed by the state on lands or property therein, belonging to or which may be hereafter purchased by the United States or reserved for use: *Provided*, That nothing in this ordinance shall preclude the state from taxing as other lands are taxed any lands owned or held by any Indian who has severed his tribal relations, and has obtained from the United States or from any person a title thereto by patent or other grant, save and except such lands as have been or may be granted to any Indian or Indians under any act of congress containing a provision exempting the lands thus granted from taxation, which exemption shall continue so long and to such an extent as such act of congress may prescribe.

APPENDIX O

Retail Sales Tax, ch. 82.08 RCW

82.08.020 Retail sales tax imposed. There is levied and there shall be collected a tax on each retail sale in this state equal to four and one-half percent of the selling price: *Provided*, That from and after the first day of June, 1976, until the thirtieth day of June, 1977, such tax shall be levied and collected in an amount equal to four and six-tenths percent of the selling price. The tax imposed under this chapter shall apply to successive retail sales of the same property.

82.08.030 Exemptions. The tax hereby levied shall not apply to the following sales:

* * *

(4) Sales which the state is prohibited from taxing under the Constitution of this state or the Constitution or laws of the United States;

82.08.050 Buyer to pay, seller to collect tax —— Penalties. The tax hereby imposed shall be paid by the buyer to the seller, and each seller shall collect from the buyer the full amount of the tax payable in respect to each taxable sale in accordance with the schedule of collections adopted by the department pursuant to the provisions of RCW 82.08.060. The tax required by this chapter, to be collected by the seller, shall be deemed to be held in trust by the seller until paid to the department, and any seller who appropriates or converts the tax collected to his own use or to any use other than the payment of the tax to the extent that the money required to be collected is not available for payment on the due date as prescribed in this chapter shall be guilty of a gross misdemeanor.

In case any seller fails to collect the tax herein imposed or having collected the tax, fails to pay it to the department in the manner prescribed by this chapter, whether such failure is the result of his own acts or the

result of acts or conditions beyond his control, he shall, nevertheless, be personally liable to the state for the amount of the tax.

The amount of tax, until paid by the buyer to the seller or to the department, shall constitute a debt from the buyer to the seller and any seller who fails or refuses to collect the tax as required with intent to violate the provisions of this chapter or to gain some advantage or benefit, either direct or indirect, and any buyer who refuses to pay any tax due under this chapter shall be guilty of a misdemeanor. The tax required by this chapter to be collected by the seller shall be stated separately from the selling price and for purposes of determining the tax due from the buyer to the seller and from the seller to the department it shall be conclusively presumed that the selling price quoted in any price list, sales document, contract or other agreement between the parties does not include the tax imposed by this chapter.

Where a buyer has failed to pay to the seller the tax imposed by this chapter and the seller has not paid the amount of the tax to the department, the department may, in its discretion, proceed directly against the buyer for collection of the tax, in which case a penalty of ten percent may be added to the amount of the tax for failure of the buyer to pay the same to the seller, regardless of when the tax may be collected by the department; and all of the provisions of chapter 82.32 RCW, including those relative to interest and penalties, shall apply in addition; and, for the sole purpose of applying the various provisions of chapter 82.32 RCW, the fifteenth day of the month following the tax period in which the purchase was made shall be considered as the due date of the tax.

APPENDIX P

Use Tax, ch. 82.12 RCW

82.12.020 Use tax imposed. There is hereby levied and there shall be collected from every person in this state a tax or excise for the privilege of using within this state as a consumer any article of tangible personal property purchased at retail, or acquired by lease, gift, repossession, or bailment, or extracted or produced or manufactured by the person so using the same, or otherwise furnished to a person engaged in any business taxable under RCW 82.04.280, subsections (2) or (7). This tax will not apply with respect to the use of any article of tangible personal property purchased, extracted, produced or manufactured outside this state until the transportation of such article has finally ended or until such article has become commingled with the general mass of property in this state. This tax shall apply to the use of every article of tangible personal property, including property acquired at a casual or isolated sale, and including byproducts used by the manufacturer thereof, except as hereinafter provided, irrespective of whether the article or similar articles are manufactured or are available for purchase within this state. Except as provided in subdivision (2) of RCW 82.12.030, payment by one purchaser or user of tangible personal property of the tax imposed by chapter 82.08 or 82.12 RCW shall not have the effect of exempting any other purchaser or user of the same property from the taxes imposed by such chapters. The tax shall be levied and collected in an amount equal to the value of the article used by the taxpayer multiplied by the rate of four and one-half percent: *Provided,* That from and after the first day of June, 1976, until the thirtieth day of June, 1977, such tax shall be levied and collected in an amount equal to the value of the article used by the taxpayer multiplied by the rate of four and six-tenths percent.

APPENDIX Q

Cigarette Tax, ch. 82.24 RCW

82.24.020 Tax imposed —— Rate —— Possession, defined. There is levied and there shall be collected as hereinafter provided, a tax upon the sale, use, consumption, handling, possession or distribution of all cigarettes, in an amount equal to the rate of six and one-half mills per cigarette. For purposes of this section, and for purposes of RCW 28A.47.440 and 73.32.130, "possession" shall mean both (1) physical possession by the purchaser and, (2) when cigarettes are being transported to or held for the purchaser or his designee by a person other than the purchaser, constructive possession by the purchaser or his designee, which constructive possession shall be deemed to occur at the location of the cigarettes being so transported or held.

82.24.030 Stamps to be affixed —— Meter machines authorized. In order to enforce collection of the tax hereby levied, the department of revenue shall design and have printed stamps of such size and denominations as may be determined by the department, such stamps to be affixed on the smallest container or package that will be handled, sold, used, consumed, or distributed, to permit the department to readily ascertain by inspection, whether or not such tax has been paid. Every person shall cause to be affixed on every package of cigarettes on which a tax is due, stamps of an amount equaling the tax due thereon before he sells, offers for sale, uses, consumes, handles, removes, or otherwise disturbs and distributes the same: *Provided,* That where it is established to the satisfaction of the department that it is impractical to affix such stamps to the smallest container or package, the department may authorize the affixing of stamps of appropriate denomination to a large container or package.

The department may authorize the use of meter stamping machines for imprinting stamps, which imprinted stamps shall be in lieu of those otherwise provided for under this chapter, and if such use is authorized, shall provide reasonable rules and regulations with respect thereto.

82.24.040 Duty of wholesaler. Every wholesaler in this state shall, within a reasonable time after receipt of any of the articles taxed herein, cause the same to have the requisite denomination and amount of stamps affixed to represent the tax imposed herein: *Provided,* That any wholesaler who furnishes surety bond in a sum satisfactory to the department, shall be permitted to set aside, without affixing the stamps required by this chapter, such part of his stock as may be necessary for the conduct of his business in making sales to persons in another state or foreign country, to instrumentalities of the federal government, or to the established governing bodies of any Indian tribe, recognized as such by the United States Department of the Interior. Such unstamped stock shall be kept separate and apart from stamped stock: *Provided further,* That every wholesaler shall, at the time of shipping or delivering any of the articles taxed herein to a point outside of this state, or to a federal instrumentality, or to an Indian tribal organization, make a true duplicate invoice of the same which shall show full and complete details of the sale or delivery, whether or not stamps were affixed thereto, and shall transmit such true duplicate invoice to the main office of the department, at Olympia, not later than the fifteenth day of the following calendar month, and for failure to comply with the requirements of this section the department may revoke the permission granted to the taxpayer to maintain a stock of goods to which the stamps required by this chapter have not been affixed. The department may also revoke this permission to maintain a stock of unstamped goods for sale to a specific Indian tribal organization when it appears that sales of unstamped cigarettes to persons who are not

enrolled members of a recognized Indian tribe are taking place, or have taken place, within the exterior boundaries of the reservation occupied by that tribe.

82.24.050 Duty of retailer. Every retailer shall, within a reasonable time after receipt of any of the articles taxed herein, cause the same to have the requisite denomination and amount of stamps affixed to represent the tax imposed herein: *Provided,* That those articles to which stamps have been properly affixed by a wholesaler or another retailer may be retained by any retailer, and that those articles intended for sale to qualified purchasers may be retained by federal instrumentalities and Indian tribal organizations, without affixing the stamps required by this chapter.

82.24.080 Legislative intent. It is the intent and purpose of this chapter to levy a tax on all of the articles taxed herein, sold, used, consumed, handled, possessed, or distributed within this state and to collect the tax from the person who first sells, uses, consumes, handles, possesses (either physically or constructively, in accordance with RCW 82.24.020) or distributes them in the state. It is further the intent and purpose of this chapter that whenever any of the articles herein taxed is given away for advertising or any other purpose, it shall be taxed in the same manner as if it were sold, used, consumed, handled, possessed, or distributed in this state.

It is also the intent and purpose of this chapter that the tax shall be imposed at the time and place of the first taxable event occurring within this state: *Provided, however,* That failure to pay the tax with respect to a taxable event shall not prevent tax liability from arising by reason of a subsequent taxable event.

82.24.130 Contraband —— Seizure and sale. Subject to the provisions of RCW 82.24.250, any articles taxed herein found at any point within this state, which articles shall be held, owned or possessed by any person, and not having the stamps affixed to the packages or

containers are hereby declared to be contraband goods, and may be seized by the department of revenue, or its duly authorized agent, or by any peace officer of the state, when directed by the department of revenue so to do, without a warrant, and said goods shall be offered by the department of revenue for sale at public auction to the highest bidder after due advertisement, but the department of revenue before delivering any of the goods so seized shall require the person, to whom such articles are sold, to affix the proper amount of stamps. The proceeds of sale of any goods sold hereunder shall be paid to the department of revenue.

The cost of seizure and sale shall be paid out of the proceeds derived from the sale before making remittance.

Any vending machine and any vehicle, not a common carrier, which may be used for the purpose of violating the provisions of his chapter shall likewise be subject to seizure and sale in the same manner.

Notwithstanding the foregoing provisions of this section, articles taxed herein which are in the possession of a wholesaler or retailer, licensed by the department, pursuant to the provisions of chapter 19.91 RCW for a period of time necessary to affix the stamps after receipt of the articles, shall not be considered contraband.

82.24.250 Transportation of unstamped cigarettes —— Invoices and delivery tickets required —— Stop and inspect. Every person who shall transport cigarettes not having the stamps affixed to the packages or containers, upon the public highways, roads or streets of this state shall have in his actual possession invoices or delivery tickets for such cigarettes, which shall show the true name and address of the consignor or seller, the true name of the consignee or purchaser, and the quantity and the brands of cigarettes so transported. If the cigarettes are consigned to or purchased by any person in this state such purchaser or consignee must be a person who is authorized by chapter 82.24 RCW to possess unstamped cigarettes in this state. In the absence of such

invoices or delivery tickets, or, if the name or address of the consignee or purchaser is falsified or if the purchaser or consignee is not authorized by chapter 82.24 RCW to possess unstamped cigarettes, the cigarettes so transported shall be deemed contraband subject to seizure and sale under the provisions of RCW 82.24.130.

Transportation of cigarettes from a point outside this state to a point in some other state will not be considered a violation of this section provided that the person so transporting such cigarettes has in his possession adequate invoices or delivery tickets which give the true name and address of such out-of-state purchaser or consignee.

In any case where the department or its duly authorized agent, or any peace officer of the state, has knowledge or reasonable grounds to believe that any vehicle is transporting cigarettes in violation of this section, the department, such agent, or such police officer, is authorized to stop such vehicle and to inspect the same for contraband cigarettes.

For purposes of this section, the term "person authorized by chapter 82.24 RCW to possess unstamped cigarettes" shall mean a wholesaler or retailer licensed pursuant to the provisions of chapter 19.91 RCW, the United States or an agency thereof, and any Indian tribal organization authorized to possess unstamped cigarettes.

82.24.260 Selling or disposing of unstamped cigarettes —— Retailer to collect and remit tax —— Liability. Any retailer who sells or otherwise disposes of any unstamped cigarettes other than (1) a federal instrumentality with respect to sales to authorized military personnel and (2) a federally recognized Indian tribal organization with respect to sales to enrolled members of the tribe shall collect from the buyer or transferee thereof the tax imposed on such buyer or transferee by RCW 82.24.020, 28A.47.440, and 73.32.130, and remit the same to the department after deducting from the tax collected the compensation he would have

been entitled to under the provisions of this chapter, RCW 28A.47.440 and 73.32.130 if he had affixed stamps to the unstamped cigarettes. Such remittance shall be made at the same time and manner as remittances of the retail sales tax as required under chapters 82.08 and 82.32 RCW. In the event the retailer fails to collect the tax from the buyer or transferee, or fails to remit the same, the retailer shall be personally liable therefor, and shall be subject to the administrative provisions of RCW 82.24.230 with respect to the collection thereof by the department. The provisions of this section shall not relieve the buyer or possessor of unstamped cigarettes from personal liability for the tax imposed by RCW 82.24.020, 28A.47.440 and 73.32.130.

Nothing in this section shall relieve a wholesaler or a retailer from the requirements of affixing stamps pursuant to RCW 82.24.040 and 82.24.050.

APPENDIX R

Motor Vehicle Excise Tax, ch. 82.44 RCW

82.44.020 Basic tax imposed. An excise tax is imposed for the privilege of using in the state any motor vehicle, except those operated under dealer's licenses. The annual amount of such excise shall be two percent of the fair market value of such vehicle: *Provided,* That in no case shall the tax be less than two dollars.

82.44.060 Payment of tax —— Abatement for fractional year —— Transfer of ownership. (Effective until January 1, 1977.) The excise tax hereby imposed shall be due and payable to the county auditor at the time of registration of a motor vehicle. Whenever an application is made to the auditor for a license for a motor vehicle he shall collect, in addition to

the amount of the license fee, the amount of the excise tax imposed by this chapter, and no dealer's license or license plates, and no license or license plates for a motor vehicle shall be issued unless such tax is paid in full. The excise tax hereby imposed shall be collected for each calendar year: *Provided,* That the calendar year shall be divided into twelve parts corresponding to the months of the calendar year and the excise tax upon a motor vehicle licensed for the first time in this state after the last day of any month shall only be levied for the remaining months of the calendar year including the month in which the motor vehicle is being licensed: *Provided further,* That the tax shall in no case be less than two dollars.

A motor vehicle shall be deemed licensed for the first time in this state when such vehicle was not previously licensed by this state for the year immediately preceding the year in which the application for license is made.

No additional tax shall be imposed under this chapter upon any vehicle upon the transfer of ownership thereof if the tax imposed with respect to such vehicle has already been paid for the year or fraction of a year in which transfer of ownership occurs.

82.44.060 Payment of tax —— Abatement for fractional year —— Transfer of ownership. (Effective January 1, 1977.) The excise tax hereby imposed shall be due and payable to the department of motor vehicles or its agents at the time of registration of a motor vehicle. Whenever an application is made to the department of motor vehicles or its agents for a license for a motor vehicle there shall be collected, in addition to the amount of the license fee or renewal license fee, the amount of the excise tax imposed by this chapter prorated to comply with the effective date of the annual schedule prepared pursuant to RCW 82.44.040, and no dealer's license or license plates, and no license or license plates for a motor vehicle shall be issued unless such tax is paid in full. The excise tax hereby imposed shall be collected for each registration year: *Provided,* That the excise tax upon

a motor vehicle licensed for the first time in this state after the last day of any registration month shall only be levied for the remaining months of the registration year including the month in which the motor vehicle is being licensed: *Provided further,* That the tax shall in no case be less than two dollars.

A motor vehicle shall be deemed licensed for the first time in this state when such vehicle was not previously licensed by this state for the registration year immediately preceding the registration year in which the application for license is made or when the vehicle has been registered in another jurisdiction subsequent to any prior registration in this state.

No additional tax shall be imposed under this chapter upon any vehicle upon the transfer of ownership thereof if the tax imposed with respect to such vehicle has already been paid for the registration year or fraction of a registration year in which transfer of ownership occurs.

82.44.110 Disposition of revenue. The county auditor shall regularly, when remitting license fee receipts, pay over and account to the director of motor vehicles for the excise taxes collected under the provisions of this chapter. The director shall forthwith transmit the excise taxes to the state treasurer, ninety-eight percent of which excise tax revenue shall upon receipt thereof be credited by the state treasurer to the general fund, and two percent of which excise tax revenue shall be credited by the state treasurer to the motor vehicle fund to defray administrative and other expenses incurred by the state department of motor vehicles in the collection of the excise tax.

APPENDIX S

Taxation of Travel Trailers and Campers, ch. 82.50 RCW

82.50.400 Tax imposed —— Collection —— Transfer or ownership. (Effective until January 1, 1977.) An annual excise tax is imposed on the owner of any travel trailer or camper for the privilege of using such travel trailer or camper in this state. The tax shall be collected for each calendar year by the department of motor vehicles or the county auditor of the county in which the travel trailer or camper is located at the time payment is made and shall be due on and after January 1st or on the date the travel trailer or camper is first purchased or brought into this state, and paid on or before January 31st of each calendar year or thirty days after the travel trailer or camper is first purchased or brought into this state, whichever is later. No additional tax shall be imposed under this chapter upon any travel trailer or camper upon the transfer of ownership thereof, if the tax imposed by this chapter with respect to such travel trailer or camper has already been paid for the calendar year or fractional part thereof in which such transfer occurs.

82.50.400 Tax imposed —— Collection —— Transfer of ownership. (Effective January 1, 1977.) An annual excise tax is imposed on the owner of any travel trailer or camper for the privilege of using such travel trailer or camper in this state. The tax shall be collected for each registration year by the department of motor vehicles or the county auditor of the county in which the travel trailer or camper is located at the time payment is made and shall be due on and after the first day of the registration year or on the date the travel trailer or camper is first purchased or brought into this state, and paid on or before the first day of each registration year or thirty days after the travel trailer or camper is first purchased or brought into this state, whichever is later. No additional tax shall be imposed under this chapter upon

any travel trailer or camper upon the transfer of ownership thereof, if the tax imposed by this chapter with respect to such travel trailer or camper has already been paid for the registration year or fractional part thereof in which such transfer occurs.

82.50.410 Rate —— Minimum payable. (Effective until January 1, 1977.) The rate and measure of tax imposed by this chapter for each calendar year shall be one percent of the fair market value of the travel trailer or camper, as determined in the manner provided in this chapter: *Provided,* That the calendar year shall be divided into twelve parts corresponding to the months of the calendar year and the excise tax upon a travel trailer or camper used for the first time in this state after the last day of any month shall only be levied for the remaining months of the calendar year including the month in which the travel trailer or camper is first used: *Provided further,* That the minimum amount of tax payable shall be two dollars.

A travel trailer or camper shall be deemed used for the first time in this state when such vehicle was not previously licensed by this state for the year or any part thereof immediately preceding the year in which application for license is made.

82.50.410 Rate —— Minimum payable. (Effective January 1, 1977.) The rate and measure of tax imposed by this chapter for each registration year shall be one percent of the fair market value of the travel trailer or camper, as determined in the manner provided in this chapter: *Provided,* That the excise tax upon a travel trailer or camper used for the first time in this state after the last day of any registration month shall only be levied for the remaining months of the registration year including the month in which the travel trailer or camper is first used: *Provided further,* That the minimum amount of tax payable shall be two dollars.

A travel trailer or camper shall be deemed used for the first time in this state when such vehicle was not previously licensed by this state for the registration year or any part thereof immediately preceding the registration year in which application of license is made.

82.50.510 Remittance of tax to state —— Distribution to cities, counties and schools. The county auditor shall regularly, when remitting motor vehicle excise taxes, pay to the state treasurer the excise taxes collected under this chapter. The treasurer shall then distribute such funds quarterly on the first day of the month of January, April, July and October of each year in the following amount: Fifteen percent to cities and towns for the use thereof apportioned ratably among such cities and towns on the basis of population; fifteen percent to counties for the use thereof to be apportioned ratably among such counties on the basis of moneys collected in such counties from the excise taxes imposed under this chapter; and seventy percent for schools to be deposited in the state general fund.

82.50.540 Taxed and licensed travel trailers or campers entitled to use streets and highways. Travel trailers or campers taxed and licensed under the provisions of this chapter shall be entitled to the use of the public streets and highways subject to the provisions of the motor vehicle laws of this state except as herein otherwise provided.

APPENDIX T

Vehicle Licensing, ch. 46.16 RCW

46.16.010 Licenses and plates required —— Exceptions. It shall be unlawful for a person to operate any vehicle over and along a public highway of this state

without first having obtained and having in full force and effect a current and proper vehicle license and display vehicle license number plates therefor as by this chapter provided: *Provided,* That these provisions shall not apply to farm vehicle as defined in RCW 46.04.181 if operated within a radius of fifteen miles of the farm where principally used or garaged, farm tractors and farm implements including trailers designed as cook or bunk houses used exclusively for animal herding temporarily operating or drawn upon the public highways, and trailers used exclusively to transport farm implements from one farm to another during the daylight hours or at night when such equipment has lights that comply with the law: *Provided further,* That these provisions shall not apply to spray or fertilizer applicator rigs designed and used exclusively for spraying or fertilization in the conduct of agricultural operations and not primarily for the purpose of transportation, and nurse rigs or equipment auxiliary to the use of and designed or modified for the fueling, repairing or loading of spray and fertilizer applicator rigs and not used, designed or modified primarily for the purpose of transportation: *Provided further,* That these provisions shall not apply to equipment defined as follows:

"Special highway construction equipment" is any vehicle which is designed and used primarily for grading of highways, paving of highways, earth moving, and other construction work on highways and which is not designed or used primarily for the transportation of persons or property on a public highway and which is only incidentally operated or moved over the highway. It includes, but is not limited to, road construction and maintenance machinery so designed and used such as portable air compressors, air drills, asphalt spreaders, bituminous mixers, bucket loaders, track laying tractors, ditchers, leveling graders, finishing machines, motor graders, paving mixers, road rollers, scarifiers, earth moving scrapers and carryalls, lighting plants, welders, pumps, power shovels and draglines, self-propelled and

tractor-drawn earth moving equipment and machinery, including dump trucks and tractor-dump trailer combinations which either (1) are in excess of the legal width or (2) which, because of their length, height or unladen weight, may not be moved on a public highway without the permit specified in RCW 46.44.090 and which are not operated laden except within the boundaries of the project limits as defined by the contract, and other similar types of construction equipment, or (3) which are driven or moved upon a public highway only for the purpose of crossing such highway from one property to another, provided such movement does not exceed five hundred feet and the vehicle is equipped with wheels or pads which will not damage the roadway surface.

Exclusions:

"Special highway construction equipment" does not include any of the following:

Dump trucks originally designed to comply with the legal size and weight provisions of this code notwithstanding any subsequent modification which would require a permit, as specified in RCW 46.44.090, to operate such vehicles on a public highway, including trailers, truck-mounted transit mixers, cranes and shovels, or other vehicles designed for the transportation of persons or property to which machinery has been attached.

APPENDIX U

Administrative Regulation, Cigarette Tax

WAC 458-20-186 (Rule 186) Tax on cigarettes. The Washington state cigarette tax is imposed in the total amount of 16 cents upon each package of 20 cigarettes by the following statutes:

1. RCW 82.24.020, which imposes a tax of six and one-half mills per cigarette;

2. RCW 73.32.130, which imposes a tax of 1 mill per cigarette to provide for the retirement of the Veterans Bonus Bonds;

3. RCW 28.47.440 [28A.47.440], which imposes a tax of ½ mill per cigarette to provide for financing the state school construction bond program.

This tax is payable by the first person who sells, uses, consumes, handles or distributes the cigarettes in this state. Payment is made through the purchase of stamps from the Department of Revenue or its authorized agent.

EXEMPTIONS. The cigarette tax does not apply upon cigarettes sold to persons licensed as cigarette distributors in other states when, as a condition of the sale, the seller either delivers the cigarettes to such a buyer at a point outside this state, or delivers the same to a common carrier with the shipment consigned by the seller to such a buyer at a location outside this state. Any person engaged in making sales to licensed distributors in other states or making export sales (see Rule 193A [WAC 458-20-193A] and Rule 193C [WAC 458-20-193C]) or in making sales to the federal government or to the established governing bodies of an Indian tribe recognized as such by the U.S. Department of the Interior and who are authorized by Rule 192 [WAC 458-20-192] to receive unstamped cigarettes who furnishes surety bond in a sum satisfactory to the Department of Revenue, may set aside such part of his stock as may be necessary for the conduct of such business without affixing cigarette tax stamps. Such unstamped stock must be kept separate and apart from any stamped stock.

Cigarettes, other than those above mentioned, are not exempt from the tax by reason of their sale either to an Indian or for resale on an Indian reservation. Permission to maintain an unstamped stock of cigarettes for sale to a specified Indian tribe may be revoked when it appears that sales to unauthorized purchasers are being, or have been, made.

COLLECTION. Stamps indicating the payment of the cigarette tax must be affixed prior to any sale of the cigarettes. The stamp must be applied to the smallest container or package, unless the department determines that it is impractical to do so.

Every wholesaler or retailer in the state shall stamp within 72 hours after receipt, any of the articles taxed herein. Stamps must be of the heat applied "fuson" type. The use of meter stamping machines for use in imprinting packages in lieu of attaching stamps, is not authorized by the department. The use of water "decalcomania" type stamps by such vendors is not authorized.

Persons other than wholesalers or retailers, upon holding, owning, possessing or controlling cigarettes in this state, must affix stamps on or before the close of the first business day following receipt of the cigarettes.

Prior to receipt or transportation of cigarettes in this state such persons must file with a district office of the Department of Revenue a Notice of Intent to Possess Unstamped Cigarettes in the State of Washington. A copy of this notice, validated by an agent of the Department of Revenue, must be in the possession of any such person who is in possession of unstamped cigarettes in this state.

Persons who have filed the aforementioned notice must bring the cigarettes to a district office of the Department of Revenue and there affix the required stamps within the time limitation provided above.

Any unstamped cigarettes in the possession of persons (other than wholesalers or retailers) who have either failed to file a Notice of Intent to Possess Unstamped Cigarettes in the State of Washington or who have failed to affix stamps within the time limitation provided above will be deemed contraband and subject to seizure and sale under the provisions of RCW 82.24.130.

The "fuson" type stamps are available, in rolls of 30,000 stamps, from an authorized bank. Payment for stamps may be made either at the time of the sale, or

deferred until later, although the latter form of payment is available only to vendors who meet the requirements of the department and who have furnished a surety bond equal to the proposed total monthly credit limit, or in the amount of $2,500, whichever is greater. In addition, purchases on a deferred payment plan may be made only by the cigarette seller himself or by an agent authorized by him to do so. This authorization may be in the form of a signature card, filed with the bank, from which stamps are usually obtained, and kept current by the vendor. Payments under a deferred plan are due 30 days following the purchase, and are to be paid at the outlet from which the stamps were obtained, and may be paid by check payable to the Department of Revenue. Cigarette dealers, either retail or wholesale, who purchase stamps under either plan are allowed, as compensation for their services in affixing stamps, an amount equal to $1.85 per thousand stamps, which may be offset against the purchase price.

BOOKS AND RECORDS. An accurate set of records, showing all transactions had with reference to the purchase, sale or distribution of articles subject to the cigarette tax must be retained. These records may be combined with those required in connection with the Tobacco Products Tax, by Rule 185 [WAC 458-20-185], provided there is a segregation therein of the amount involved. All such records must be preserved for 5 years from the date of the transaction.

In particular, persons shipping or delivering any of the articles taxed herein to a point outside of this state shall transmit to the Miscellaneous Tax Section, not later than the 15th of the following calendar month, a true duplicate invoice showing full and complete details of the interstate sale or delivery.

REPORTS AND RETURNS. The Department of Revenue may require any person dealing with cigarettes, in this state, to complete and return forms, as furnished, setting forth sales, inventory and other data required by the department to maintain control over trade in the articles taxed herein.

Manufacturers selling these articles shall, before the 15th day of each month, transmit to the Miscellaneous Tax Section a complete record of sales of cigarettes in this state during the preceding month.

REFUNDS. Any person may request a refund of the face value of the stamps, less the affixing discount when cigarettes to which they are affixed are:

1. Damaged, or unfit for sale, and as a result are destroyed or returned to the manufacturer or distributor.

2. Sold and shipped to a registered dealer regularly making sales of cigarettes in another state.

In either case, the claim for refund, (a form which is provided by the department) must be accompanied by an affidavit, in the first instance, of the receipt by the manufacturer and, in the second instance, of the receipt by the buyer of cigarettes bearing stamps from this state.

Revised May 2, 1975.

APPENDIX V

Administrative Regulation

WAC 458-20-192 (Rule 192) Indians, Indian Reservations

DEFINITIONS

The term "Indian reservation," as used herein, means all lands, notwithstanding the issuance of any patent, within the exterior boundaries of areas set aside by the United States for the exclusive use and occupancy of Indian tribes by treaty, law, or executive order which areas are currently recognized as "Indian reservations" by the United States Department of the Interior.

The following Washington reservations are the only "Indian reservations" currently recognized as such by the United States Department of Interior: Chehalis, Colville, Hoh, Kalispel, Lower Elwha, Lummi, Makah, Muckleshoot, Nisqually, Nooksack, Ozette, Port Gamble, Port Madison, Puyallup, Quileute, Quinault, Shoalwater, Skokomish, Spokane, Squaxin Island, Swinomish, Tulalip, and Yakima.

The term "Indian tribe," as used herein, means any organized Indian nation, tribe, band, or community recognized as an "Indian tribe" by the United States Department of the Interior.

The term "Indian," as used herein, means persons duly registered on the tribal rolls of the Indian tribe occupying an Indian reservation.

NOTE: For purposes of this rule, with respect to determining tax liability regarding any economic transaction or activity, the term "Indian tribe" includes only an Indian tribe upon and within whose Indian reservation such transaction or activity occurs, and the term "Indian" includes only a person duly registered on the tribal rolls of the Indian tribe upon and within whose Indian reservation such transaction or activity occurs.

Under the revenue laws of the State of Washington, the tax liability of Indians and of persons conducting business with Indians is as follows:

BUSINESS AND OCCUPATION TAX

Indians and Indian tribes are not taxable with respect to business conducted by them wholly within an Indian reservation.

No deduction is allowed to others by reason of business conducted with Indians or Indian tribes within an Indian reservation.

RETAIL SALES TAX

Indians and Indian tribes are not subject to the sales tax upon sales to them of tangible personal property or

otherwise taxable services which are made wholly within an Indian reservation.

Sales of tangible personal property to Indians or Indian tribes by off-reservation persons are subject to the retail sales tax except where the seller makes actual delivery of the property sold to a point within an Indian reservation.

Sales of taxable services to Indians or Indian tribes are subject to the retail sales tax except where the services are rendered entirely within an Indian reservation.

Sales to persons other than Indians are subject to the retail sales tax irrespective of where delivery or rendition of services takes place. Thus, Indian and Indian tribal retailers are required to collect and remit to the state the retail sales tax upon each taxable sale made by them within an Indian reservation to persons other than Indians.

In order to substantiate the tax-exempt status of a retail sale made within an Indian reservation to an Indian purchaser, unless the purchaser is personally known to the retailer as an enrolled Indian, the retailer shall require presentation of a tribal membership card identifying the purchaser as duly registered on the tribal rolls of an Indian tribe under such lawful criteria as the tribal organization has established. A record shall be retained by the retailer of all tax-exempt sales to support the sales tax deduction on returns filed with the Department, identifying the dollar amount of the sale and indicating the name of the purchaser, tribal affiliation of the purchaser, the Indian reservation to which or within which delivery or rendition of services was made, and the date of sale.

USE TAX

Indians and Indian tribes are not subject to the use tax upon the use of tangible personal property within an Indian reservation. However, Indians and Indian tribes will become liable for the use tax when any such property

is placed into actual use outside the Indian reservation, irrespective of the fact that the first use of the property may have been within the reservation.

SPECIAL APPLICATION OF RETAIL SALES TAX AND USE TAX WITH RESPECT TO SALES OF MOTOR VEHICLES OR TRAILERS TO INDIANS AND INDIAN TRIBES. When motor vehicles or trailers sold to Indians or Indian tribes are licensed by the State of Washington at the time of sale, or at any time thereafter, a presumption is raised that such motor vehicles or trailers are for use on the highways of the State of Washington. When motor vehicles or trailers are licensed prior to delivery, dealers are required to collect the retail sales tax in every instance, regardless of delivery point. County Auditors must collect the use tax when Indians or Indian tribes apply for a license or transfer of registration unless the applicant can show that retail sales tax or use tax has previously been paid on the sale or use of the vehicle or trailer by the applicant.

CIGARETTE TAX

Sales of cigarettes to non-Indians by Indians or Indian tribes are subject to the cigarette tax, since the tax is levied upon the non-Indian purchaser and the vendor is obligated to make precollection of the tax. Therefore, Indian or tribal vendors making, or intending to make, sales to non-Indian customers must purchase a stock of cigarettes with Washington state cigarette tax stamps affixed for the purpose of making such sales. However, Indians and Indian tribes may make purchases of unstamped cigarettes from licensed cigarette distributors for resale to qualified purchasers. For purposes of this rule, "qualified purchaser" means (1) an Indian purchasing for resale within the reservation to other Indians, and (2) an Indian purchasing solely for his or her use other than for resale.

Delivery of unstamped cigarettes by a licensed distributor to Indians or Indian tribes must be by bonded

carrier or the distributor's own vehicle to the Indian reservation. Delivery of unstamped cigarettes at the distributor's dock or place of business or any other off-reservation location is prohibited.

Revised November 12, 1976.

APPENDIX W

EXCISE TAX BULLETIN

ETB 504.08.192 Issued November 24, 1976

SALES TO OR BY INDIANS

The purpose of the bulletin is to outline procedures to implement Rule 192, as revised November 12, 1976, and to provide additional details for explanation of certain provisions of that administrative rule.

1. **Registration Requirements.** All retailers within an Indian reservation are required to collect sales tax (and cigarette tax) on sales to non-Indians. This means that Indian retailers and Indian tribe retailers are required to be registered to collect and remit to the State the applicable State and local sales tax and the cigarette tax on sales to non-Indians, but no registration fee is required for registration of such retailers. (Such a business license fee is constitutionally impermissible under Moe v. Salish and Kootenai Tribes, 48 L Ed 2d 96.)

Retailers can accomplish registration by telephoning or going to any of the following offices of the State Department of Revenue:

Aberdeen 532-2840
2700 Simpson Avenue
P.O. Box 1018, 98520

Port Angeles 457-8503
1601 East Front Street
Bldg. 2, Suite A, 98362

Bellingham 676-2114
2500 Elm Street, Suite A
P.O. Box 1176, 98225

Bremerton 478-4961
Great N.W. Savings & Loan Bldg.
Lower Level, 5th & Pacific
P.O. Box 407, 98310

Ephrata 754-3771
138 W. Division
P.O. Box 11184, 98823

Everett 259-8566
2020 35th Street
P.O. Box 6, 98206

Longview 577-2015
P.O. Box 339
1418 15th St., Weyerhaeuser Credit Union Bldg., Rm. 304, 98632

Mt. Vernon 336-2954
416 Main Street (Monday only)
P.O. Box 278, 98273

Pasco 545-2442
1600 C West Clark
P.O. Box 767, 99301

Seattle 464-6827
710 Second Avenue
901 Dexter Horton Bldg., 98104

Spokane 456-3140
300 Northtown Office Bldg.
North 4407 Division, 99207

Tacoma 593-2874
Rm. 207 Professional Bldg.
705 S. 9th, 98405

Vancouver 696-6151
State Office Bldg.
904 Franklin Street
P.O. Box 787, 98660

Walla Walla 527-4306
202 Drumheller Bldg., 99362

Wenatchee 663-1651
1139 Princeton
P.O. Box 1945, 98801

Yakima 575-2783
214 Liberty Bldg.
P.O. Box 407, 98907

Olympia Headquarters 753-5540
412 General Administration Bldg.
Olympia, Washington 98504

2. **Records to be Kept.** Sales to Indians, when delivery is made within the Indian reservation on whose tribal rolls such Indian purchasers are duly registered, are exempt from sales tax. But to demonstrate entitlement to make such sales without collection of tax, all retailers must retain, as a part of their books and records to be available for examination by the Department of Revenue as specified by RCW 82.32.070, the following for each sale:

a. Name of the Indian purchaser,
b. The tribal affiliation of the purchaser,
c. The Indian reservation to which or within which delivery was made, or within which retail services were rendered,
d. The dollar amount of the sale, and
e. The date of the sale.

Unless the Indian and his tribal affiliation are personally known to the retailer, the retailer must require the purchaser to present a tribal membership card issued by the tribe in which the purchaser is registered.

3. **Measure of Sales Tax on Cigarette or Tobacco Products Sales.** Under the holding of our Court in Canteen Service, Inc. v. State (83 Wn 2d 761) and Tonasket v. State (84 Wn 2d 164) the cigarette tax and tobacco products tax apply upon the "first taxable event" in this state. This makes a different measure for the sales tax in the case of sales by Indians to non-Indians than is the case for a taxable sale by a non-Indian.

a. **Sale by an Indian to a non-Indian:** Here the first taxable event is the possession by the non-Indian and therefore the cigarette or tobacco products tax due on the sale is *not* a part of the selling price on which sales tax is due.

b. **Sale by a non-Indian:** Here the taxable incidence falls on the first handler, distributor, or seller and thus the first taxable event occurs when the products are first handled, distributed, or sold within this state. Since this occurs prior to the retail sale, the cigarette or tobacco products tax is a part of the selling price, even in the case of sales which are sales tax exempt under paragraph 2, above. Canteen Service, supra.